

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**LSF-KEB HOLDINGS SCA, LSF SLF HOLDINGS SCA, HL HOLDINGS SCA,
KUKDONG HOLDINGS I SCA, KUKDONG HOLDINGS II SCA, STAR HOLDINGS
SCA, LONE STAR CAPITAL MANAGEMENT SPRL, LONE STAR CAPITAL
INVESTMENTS S.À.R.L.**

Claimants

and

REPUBLIC OF KOREA

Respondent

ICSID Case No. ARB/12/37

AWARD

Members of the Tribunal

The Honourable Ian Binnie CC, QC, President
The Honourable Charles N. Brower, Co-Arbitrator
Professor Brigitte Stern, Co-Arbitrator

Secretary of the Tribunal

Ms. Geraldine R. Fischer

Assistant to the President of the Tribunal

Mr. David Campbell

Date of dispatch to the Parties: 30 August 2022

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I. OVERVIEW

1. The Claimants¹ seek a total award of compensation of about USD 4.7 billion plus compound interest at the one-month U.S. Treasury rate from 30 September 2013² based on several alleged violations of their rights in respect of investments in Korea made between 1998 and 2003 under:
 - (a) the Agreement Between the Republic of Korea and the Belgium-Luxembourg Economic Union on the Encouragement and Reciprocal Protection of Investments, signed on 20 December 1974, entered into force 3 September 1976 (the “**1976 BIT**”);³ and
 - (b) the Agreement Between the Government of the Republic of Korea and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, entered into force 27 March 2011 (the “**2011 BIT**”).⁴

The alleged misconduct by the Respondent, the Republic of Korea, and its various Government agencies continued, the Claimants say, between 2005 and 2012.

2. The Claimants also invoke alleged breaches of the Convention between the Republic of Korea and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed 29 August 1977 and entered into force on 19 September 1979 (the “**Korea-Belgium Tax Treaty**” or “**Tax**”

¹ LSF-KEB Holdings SCA, LSF SLF Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, Star Holdings SCA, Lone Star Capital Management SPRL, and Lone Star Capital Investments S.à.r.l. (collectively, the “**Claimants**”).

² Claimants’ Reply on Jurisdiction and Merits, 1 October 2014 (“**Reply**”), para. 1591.

³ **Exhibit RA-001**, Agreement Between the Republic of Korea, on the One Hand, and the Belgo-Luxembourg Economic Union, on the Other Hand, on the Encouragement and Reciprocal Protection of Investments, entered into force 3 September 1976 (“**1976 BIT**”).

⁴ **Exhibit C-001**, Agreement Between the Government of the Republic of Korea and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, entered into force 27 March 2011 (“**2011 BIT**”).

Treaty”),⁵ as violations of the 2011 BIT. The Claimants litigated the tax cases in Korea’s courts. That litigation continued after 2012.

3. At the threshold of the case stand the Respondent’s jurisdictional objections which, as will be explained, are to a considerable extent (but not entirely) justified.
4. The first named Claimant, LSF-KEB Holdings SCA (“**LSF-KEB**”), is a Belgian corporation that made a major investment in 2003 to acquire a controlling interest in Korea’s third largest commercial bank (and sixth largest bank overall), the Korean Exchange Bank (“**KEB**”). Other Claimants, incorporated in Belgium (except for Lone Star Capital Investments S.à.r.l., which is incorporated in Luxembourg) acquired investments in real estate and construction from 1998 onwards.
5. All of the Claimants are affiliated with a Texas investment fund, sometimes collectively referred to as “**Lone Star**”⁶ (except where differentiation becomes necessary with respect to various claims including wrongful taxation).
6. While Lone Star does not accept the pejorative title of an “Eat and Run” investor, as termed by the Respondent, Lone Star makes no secret of its global investment policy of buying low and selling high as soon as reasonably practicable. It is not a long-term investor.⁷ When it purchased KEB shares in 2003 as a “stressed” asset of the Korean State, it agreed to a two-year lock up, not more. It looked to the protection of the investment treaty to facilitate its exit from Korea with the proceeds of its investment without, in its words, being “harassed” by the Korean regulatory and tax authorities. The Claimants state that at the time they purchased the KEB shares in 2003, it was a risky investment that other investors were not prepared to make. Shortly after the Claimants purchased a controlling share in KEB, they also acquired KEB’s credit card company, KEB Credit Services (“**KEBCS**”).

⁵ Exhibit CA-264, Convention Between the Republic of Korea and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, entered into force 19 September 1979 (“**Korea-Belgium Tax Treaty**”); Reply, paras. 893-897.

⁶ Hudson Advisors, LLC is a Texas-based limited liability company that is related to Lone Star; references to Hudson Advisors, LLC subsidiaries or affiliates are found in this text, such as entities called HudCo or Hudson Advisors Korea (“**HAK**”).

⁷ Exhibit CWE-002, Witness Statement of [REDACTED] 14 October 2013, (“[REDACTED] First Witness Statement”), paras. 2, 5.

The public market acquisition closed in late 2003. Years later, on 6 October 2011, LSF-KEB and its Lone Star appointed director, Mr. [REDACTED] were convicted of stock manipulation in connection with the acquisition of KEBCS that was considered a "serious financial crime" under Korea's *Banking Act*.⁸

7. The shares of KEB, the largest of the Lone Star investments, are traded on the open market in Korea. The base share price is thus easily ascertainable. However, Lone Star's majority shareholding was worth much more because it carried control of the bank. At issue in one branch of this arbitration is LSF-KEB's loss of a significant part (USD 433 million) of this control premium by reason, they say, of the wrongful conduct of Korea's financial regulator, the Financial Services Commission (the "FSC").⁹
8. The FSC harassment and misconduct began, the Claimants contend, at least by 2007, when LSF-KEB agreed to sell its controlling interest in KEB to the Hong Kong Shanghai Banking Corporation ("HSBC"). The Claimants calculate that the HSBC sale (the "HSBC Offer Case") would have resulted in a profit of about USD 4 billion.¹⁰ There was no

⁸ Exhibit CA-098, Republic of Korea, *Banking Act* (Law No. 8,905, partially amended 15 March 2008) ("*Banking Act*").

⁹ Under the Share Purchase Agreement with HSBC, Lone Star was to receive USD 6 billion for its shares; it finally sold the shares to Hana at USD 4.3 billion subsequently reduced (because, the Claimants say, of FSC misconduct) to USD 3.5 billion. After adjusting for a mid-year KEB dividend of USD 400 million, the reduction in share price cost LSF-KEB USD 433 million. See Exhibit C-162, Share Purchase Agreement Between LSF-KEB Holdings SCA Holdings, SCA, and HSBC Asia Pacific Holdings (UK) Ltd., 3 September 2007 ("*SPA Between LSF-KEB and HSBC*"); Exhibit C-184, Amendment to Share Purchase Agreement Between LSF-KEB Holdings SCA Holdings, SCA and HSBC Asia Pacific Holdings (UK) Ltd., 29 April 2008 ("*Amended SPA Between LSF-KEB and HSBC*"); Exhibit CWE-014, Expert Report of [REDACTED] 14 October 2013 ("*[REDACTED] First Expert Report*"), para. 50 ("The calculation follows the same steps as in the example in Figure 3, starting with the proceeds of \$6,013.4 million that Lone Star would have received from HSBC if closing had occurred on April 30, 2008."); Exhibit CWE-034, Second Expert Report of [REDACTED] ("*[REDACTED] Second Expert Report*"), para. 42 ("The calculation starts with the \$6,013.4 million that Lone Star should have received on April 30, 2008."). See also Exhibit C-754, Draft of Share Purchase Agreement Between LSF-KEB Holdings SCA Holdings, SCA and HSBC Asia Pacific Holdings (UK) Ltd., 6 August 2008; Exhibit C-227, Share Purchase Agreement Between Lone Star and Hana Financial Group, 25 November 2010 ("*SPA Between Lone Star and Hana*"); Exhibit C-229, Amendment to Share Purchase Agreement Between Lone Star and Hana Financial Group, 9 December 2010 ("*First Amendment to SPA Between Lone Star and Hana*"); Exhibit CWE-014, [REDACTED] First Expert Report, para. 58 ("The calculation follows the same steps as in the example in Figure 3, starting with the proceeds of \$4,341.7 million that Lone Star would have received from Hana if a closing had occurred on May 24, 2011, the back-stop date in the first Hana SPA."); Exhibit C-280, Amended and Restated Share Purchase Agreement Between Lone Star and Hana Financial Group, 3 December 2011 ("*Amended and Restated SPA Between Lone Star and Hana*").

¹⁰ Exhibit CWE-014, [REDACTED] First Expert Report, para. 20:

rational objection to such a global megabank as purchaser, the Claimants say, yet the sale failed because of the obstructive delaying tactics of the FSC which had come under political fire for allowing a number of other short-term foreign investors to "Eat and Run" (or "Dine and Dash") with large profits.¹¹

9. The Claimants allege that following the conviction of LSF-KEB and Mr. [REDACTED] for stock manipulation in connection with the acquisition of KEBCS, they met similar unjustified regulatory intransigence in their subsequent and ultimately successful effort to sell their controlling interest to Hana that was delayed by the FSC until January 2012 (the "Hana Offer Case").¹² The FSC approval was wrongly made conditional, the Claimants say, on a share price reduction to demonstrate to the critics of the FSC that Lone Star was being appropriately punished. The FSC's determination to appease Korean politicians and hostile public opinion was, the Claimants contend, wholly extraneous to its statutory mandate which was only to ensure that any proposed purchaser (not the vendor) would be a proper majority owner of a major Korean bank. Lone Star, as vendor, was leaving the

Lone Star's investment of approximately \$1.2 billion included \$934 million for newly issued KEB shares. The latter amount was new capital for KEB. On May 30, 2006, Lone Star invested an additional \$817 million when it exercised options to purchase KEB shares from Commerzbank and the Korea Export-Import Bank, thereby raising its ownership interest in KEB to 64.62%.

Exhibit CWE-007, Witness Statement of [REDACTED] 15 October 2013 ("[REDACTED] First Witness Statement"), para. 22:

After several days of intensive discussions and negotiations, the KEB Board came to accept the reality that merging KEB Card into KEB was the only viable solution; the risks associated with defying the FSC on an issue of such importance to the regulator were simply too high for KEB as a regulated financial institution. The unanimous view of the KEB Board, however, was that KEB should not rescue KEB Card unless the equity of KEB Card, which had no economic value, was wiped out as part of the rescue package, and KEB Card's creditors took an appropriate haircut on their loans. But the FSC refused to support either measure. Instead, the FSC insisted that the KEB Board agree to buy out Olympus Capital, KEB Card's other major shareholder, at an astounding US \$68 million price tag, and then merge the credit card company into the bank, effectively requiring KEB to use its new-found strong capital base to (i) acquire KEB Card's remaining outstanding (publicly owned) shares, to the tune of another approximately US \$75 million, and (ii) pay off KEB Card's unfunded liabilities to its creditors, all resulting in massive losses to KEB.

¹¹ Reply, paras. 73-84.

¹² Hana Financial Group, Inc. and its subsidiary Hana Bank are collectively referred to as "Hana."

country and, it says, its alleged moral deficiency was of no continuing consequence to the future of the Korean banking sector it wished to leave behind.

10. The USD 433 million price reduction reflected in the 3 December 2011 Hana Share Purchase Agreement was imposed, the Claimants argue, under duress. The revised deal was not in the Claimants' commercial best interest, they say, but they submitted under protest to mitigate the losses which they now claim in this arbitration.
11. The Claimants also allege violation of the BIT (as well as the Tax Treaty) through the unfair and unrelenting attack by the Korean National Tax Service ("NTS"), whose tactics were similarly orchestrated to deprive the Claimants of a significant portion of their justly earned investment profits.
12. The Claimants seek compensation of approximately USD 4.7 billion, plus interest dating from 30 September 2013 until the date of payment, compounded annually at the one-month U.S. Treasury rate, in the following categories:
 - (a) alleged damages, interest and tax "gross up" on the Claimants' investment claims relating to the HSBC Offer Case;
 - (b) alleged damages, interest and tax "gross up," relating to the Hana Offer Case;¹³ and
 - (c) alleged damages and interest on the Claimants' tax claims.¹⁴

After adjustments, the total is approximately USD 4,679,500,000.¹⁵

¹³ Lone Star also raised but did not pursue the alternative scenario that included "Hana Offer Case with 25% offer premium: \$1,216.9 million." See, e.g., [REDACTED] Second Expert Report, para. 7; Phase 2 Hearing, Presentation of [REDACTED] 6 July 2015, slide 13; Phase 2 Hearing, Claimants' Opening Presentation on Damages, 6 July 2015, slide 5; TD15, 4036:20-4037:6. This alternative USD 1.2 billion premium case would affect the Tribunal's calculation in n. 14 below (the total would be USD 5,896.4 (with the 25% offer premium). This "alternative scenario" was shown as speculation without any foundation in the evidence.

¹⁴ Exhibit CWE-034, [REDACTED] Second Expert Report, paras. 7-8. These figures add up to USD 5,369.8 million.

¹⁵ The Claimants' pleaded case seeks damages of USD 4,679,500,000 (Reply, para. 1591); however, the figures found in the [REDACTED] Second Expert Report add up to more than the pleaded case, namely USD 5,369.8 million. The Claimants did not amend their pleading to reconcile the pleading with the figures in the [REDACTED] Second Expert Report.

13. The Respondent denies any wrongful acts or omissions and argues that the Claimants are victims of their own criminal misconduct in the acquisition and conduct of the affairs of KEB and its credit card affiliate, KEBCS. Lone Star's stock price manipulation netted it an illegal profit calculated by the Respondent's expert, [REDACTED] at over USD 800 million, an act of criminality the Korean regulators could not be expected to overlook.¹⁶
14. The Respondent rejects the Claimants' attempts to seek to minimise the seriousness of the criminal charges underlying the many investigations and judicial proceedings arising from their acquisition and management of KEB/KEBCS. The misconduct of the Claimants, the Respondent says, placed Korea's financial authorities in a situation of unprecedented difficulty.¹⁷ These officials nevertheless acted properly in fulfilment of their statutory mandate(s).
15. Specifically, LSF-KEB's criminal conviction for stock manipulation in its acquisition of KEBCS triggered a statutory requirement to sell its KEB shares in excess of 10% by a date to be fixed by the FSC. However, LSF-KEB could only sell its control block to a purchaser approved by the FSC. Approval was given on 27 January 2012 but only after Lone Star accepted the price reduction of USD 433 million. The Respondent denies any wrongdoing

¹⁶ Second Expert Report of [REDACTED] 23 January 2015 ("[REDACTED] Second Expert Report"), para. 99 ("We understand that one of Respondent's legal positions is that Claimants' [sic] should not be able to retain any of the profit from their investment in KEB Card Services because Claimant's acquisition of full ownership of KEBCS and its integration into KEB were effectuated through wrongful and illegal means."); see also paras. 107-108, Table 12 and Appendix 4 – KEBCS Set Off, calculating that about USD 806 million of Hana's USD 3.5 billion purchase price was attributable to the Claimants' KEBCS holdings. The Claimants do not dispute this sum.

Table 12 – Potential Set Offs Related to KEBCS under Each of Dr. [REDACTED] Damages Scenarios²⁴

(All Amounts in US\$ Millions, Interest to 30 September 2013)

| Calculation | Component | HSBC Offer Case | Hana Offer Case | Hana Offer Case Plus 25% Premium |
|-----------------|---------------------------------------|-----------------|-----------------|----------------------------------|
| [A] | SPA Price for KEB Group | 6,013 | 4,342 | 4,613 |
| [B] | Interest | 61.9 | 4.8 | 5.1 |
| [C] = A + B | SPA Price for KEB Group with Interest | 6,075 | 4,346 | 4,618 |
| [D] = C x 20% | Portion Related to KEBCS | 1,215 | 869 | 924 |
| [E] | Claimants' Investment in KEBCS | 55 | 55 | 55 |
| [F] | Interest on KEBCS Investment | 9 | 9 | 9 |
| [G] = D - E - F | Profit on KEBCS | 1,151 | 806 | 860 |

¹⁷ Respondent's Counter-Memorial on Jurisdiction and Merits, 21 March 2014 ("Counter-Memorial"), para. 23.

and says the modified price was accepted by the Claimants as being in their own best commercial interest.

16. As to the tax claims, the Respondent says that all of the Claimants, except LSF-KEB, lack standing as no taxes were imposed on them, and therefore the Korea-Belgium Tax Treaty has no application to them.¹⁸ In any event, the Respondent says that violation of the Tax Treaty is not a violation of the BIT and moreover the Tribunal has no jurisdiction under the Tax Treaty. Further, the Claimants chose to submit their tax claims to the Korean courts where all of the tax arguments now put forward in this arbitration were resolved in well-reasoned judgments of the Korean courts (including the Korean Supreme Court). In the absence of any claim of “denial of justice” (which even the Claimants’ own tax expert considers would be without merit¹⁹), the Claimants individually and collectively received fair and equitable treatment.
17. For the reasons that follow, the Tribunal concludes that:
- (a) the Claimants’ investments do not qualify for treaty protection under the earlier 1976 BIT;
 - (b) the Tribunal has no jurisdiction to grant relief under the 1977 Tax Treaty;
 - (c) the Tribunal lacks jurisdiction over claims based on facts that occurred or are alleged to have occurred before the 2011 BIT became effective on 27 March 2011;
 - (d) the Respondent’s conduct in respect of the 2008 HSBC transaction and previous efforts of LSF-KEB to sell its KEB shares is therefore not actionable; and
 - (e) the Claimants elected to litigate their tax claims in the Korean courts (with mixed success). While the Respondent contends that by seeking domestic remedies the

¹⁸ The Respondent contended under the 2011 Bit Art. 8(3) that “LSF-KEB’s refund-related BIT claims concerning the Hana withholding taxes is independently barred by Article 8(3) of the 2011 BIT.” See, e.g., Rejoinder, para. 61 and Sec. III.C(2)(b)(iii). For reasons to be discussed, Lone Star’s tax claims are rejected on other grounds and it is not necessary to address the Art. 8(3) limitation defence.

¹⁹ During his cross-examination, the Claimants’ tax expert, Professor ████████ agreed that Korean courts are “neutral and not biased against foreign parties” (TD13, 3622:17-20).

Claimants waived their entitlement to pursue in this arbitration the tax claims litigated in the Korean courts, the Tribunal prefers to address the Claimants' tax arguments on their merits, and on careful consideration rejects the tax arguments on their merits.

18. Accordingly, the Claimants' case, stripped of the tax claims and allegations of misconduct that pre-date the 2011 BIT, properly focuses on the reduction of USD 433 million in the price of KEB shares paid by Hana.
19. The Tribunal by majority concludes that the FSC violated the 2011 BIT by putting its own self-interest (in surviving the political storm surrounding Lone Star) ahead of its statutory mandate to consider fairly and expeditiously Hana's application to acquire LSF-KEB's controlling interest in KEB:
 - (a) there was never any plausible doubt that Hana satisfied the statutory criteria for approval under Korea's *Financial Holding Companies Act*.²⁰ The FSC already had intimate knowledge of the affairs of Hana Bank as the Korean regulator; and
 - (b) "but for" the FSC's wrongful refusal to grant approval of the 8 July 2011 Share Purchase Agreement ("SPA") without a reduction in the share price, Hana would have closed the 30 July 2011 SPA with LSF-KEB at the July price in the autumn of 2011 which would have benefitted LSF-KEB with the said USD 433 million.
20. However, the Tribunal also finds that Lone Star by its criminal misconduct and related legal consequences contributed substantially and materially to the USD 433 million loss.²¹

²⁰ Exhibit C-169, Republic of Korea, *Financial Holding Companies Act* (Law No. 9,788, partially amended 31 July 2009) ("*Financial Holding Companies Act*").

²¹ The FSC was at the point of approving the Hana deal (according to KEB's own President) on 16 March 2011, but the approval was withheld in light of the decision of the Korean Supreme Court of 10 March 2011 which reversed and remanded LSF-KEB's acquittal of criminal stock manipulation. It was clear that a conviction in the Seoul High Court would follow (as it did on 6 October 2011). See Exhibit C-233 / R-151, Supreme Court of Korea, Case No. 2008Do6335, Judgment, 10 March 2011 ("**Supreme Court Judgment, Stock Price Manipulation**"). According to the Seoul High Court, LSF-KEB and KEB realised profits soon after their illegal acquisition; see Exhibit C-256 / R-150, Seoul High Court, Case No. 2011No806, Judgment, 6 October 2011 ("**Second High Court Judgment, Stock Price Manipulation**"), pp. 27-28, 42 ("Accordingly, KEB and LSF-KEB gained enormous profits in the amount of KRW 12,375,770,000 and KRW 10,002,500,000, respectively, which resulted in loss of minority shareholders of KEBCS."). See also [REDACTED] Second Expert Report, para. 99 ("We understand that one of Respondent's legal

The conviction of LSF-KEB triggered the FSC to order LSF-KEB to sell all KEB shares in excess of 10% by 18 May 2012 (the “Disposition Order”)²² which, according to the Tribunal majority, provided the FSC with the leverage required to impose the condition of a price reduction. The criminal conviction rendered Lone Star vulnerable and the FSC pounced on the vulnerability to its own advantage.

21. The Tribunal by majority concludes that:

- (a) the FSC declined to approve Hana in the autumn of 2011 because of public and political opposition to Lone Star not only as an “Eat and Run” investor but, worse still, a “Cheat and Run” investor;
- (b) in so doing, the FSC abused its regulatory discretion by preferring its own self-interest to performance of its statutory mandate; it succumbed to a conflict of interest;
- (c) the misconduct of the FSC violated the treaty obligation of Fair and Equitable Treatment, including Good Faith, because:
 - (i) the FSC intervention in the share price was not in furtherance of a legitimate regulatory purpose;
 - (ii) the FSC intervention was for an objective (its own self-interest) and not its professed objective (a prudential concern for the integrity of Korean banking institutions);
 - (iii) the FSC intervened to impose a price reduction which the FSC itself acknowledged would be an improper action for the FSC to undertake; and

positions is that Claimants’ [*sic*] should not be able to retain any of the profit from their investment in KEB Card Services because Claimant’s acquisition of full ownership of KEBCS and its integration into KEB were effectuated through wrongful and illegal means.”), and para. 107, Table 12, and Appendix 4 – KEBCS Set Off, calculating that about USD 806 million of Hana’s USD 3.5 billion purchase price was attributable to the Claimants’ KEBCS holdings; the Claimants do not dispute this sum.

²² Exhibit C-276, FSC, Notice of Measures against Shareholder of Korea Exchange Bank in Excess of Prescribed Limit, 18 November 2011 (“Disposition Order”).

- (iv) the FSC did not act in relation to Lone Star's investment in KEB in good faith.
- (d) equally, however, in the words of the International Law Commission Commentary on the *Articles on the Responsibility of States for Internationally Wrongful Acts* (the "ILC Articles"), Lone Star "materially contributed to the damage" by its wilful criminal conduct²³ which on 18 November 2011 enabled the FSC to make the Disposition Order forfeiting LSF-KEB's proprietary right to continue to hold its controlling interest in KEB beyond 18 May 2012.²⁴
22. The Tribunal by majority therefore concludes that both the FSC (for which Korea is responsible) and Lone Star contributed directly and materially to the loss of the USD 433 million. (This figure of USD 433 million represents the share price reduction in the 3 December 2011 Hana SPA from the purchase price set out in the 8 July 2011 Hana SPA.)
23. The Tribunal by majority concludes that the combined misconduct of the FSC and Lone Star created a single indivisible loss not capable of being disaggregated into elements with distinct and separate causes. It is not possible to allocate discrete elements of loss to either Lone Star or the FSC. The majority of the Tribunal considers that the criminal misconduct of Lone Star made such a direct and material contribution to the Treaty violations of the Respondent that the responsibility for the loss should be shared equally and the loss attributable to the Respondent therefore reduced by 50%.
24. The Tribunal by majority therefore awards to the Claimant, LSF-KEB, one half of the USD 433 million loss, namely USD 216.5 million.

²³ Exhibit CA-029 / RA-002, International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"), Art. 39, which provides:

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought. [emphasis added]

²⁴ Exhibit C-276, Financial Services Commission, Notice of Measures Against Shareholder of Korea Exchange Bank, 18 November 2011.

25. The Tribunal by majority awards interest on USD 216.5 million from 3 December 2011 until the date of payment, compounded annually at the average one-month U.S. Treasury rate.
26. As success is divided, each side will bear its own legal costs.
27. The costs of the arbitration will be shared equally.
28. The claims in the arbitration are otherwise dismissed.

II. PROCEDURAL HISTORY

A. REQUEST FOR ARBITRATION

29. On 21 November 2012, the Claimants submitted their Request for Arbitration against the Respondent (the "**Request**"), pursuant to (i) Article 8 of the 2011 BIT; and (ii) Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the "**ICSID Convention**") and to which the Republic of Korea and the Kingdom of Belgium acceded on 23 March 1967 and 26 September 1970, respectively.
30. On 10 December 2012, the Secretary-General of ICSID registered the Request, as supplemented by the Claimants' letter of 30 November 2012 responding to ICSID's questions, pursuant to Article 36(3) of the ICSID Convention.

B. DISPUTING PARTIES

31. *The Claimants:* The following eight companies.
32. *LSF-KEB Holdings SCA:* The first Claimant is LSF-KEB Holdings SCA ("LSF-KEB"). It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
33. *LSF SLF Holdings SCA:* The second Claimant is LSF SLF Holdings SCA. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.

34. *HL Holdings SCA*: The third Claimant is HL Holdings SCA. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
35. *Kukdong Holdings I SCA*: The fourth Claimant is Kukdong Holdings I SCA. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
36. *Kukdong Holdings II SCA*: The fifth Claimant is Kukdong Holdings II SCA. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
37. *Star Holdings SCA*: The sixth Claimant is Star Holdings SCA. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
38. *Lone Star Capital Management SPRL*: The seventh Claimant is Lone Star Capital Management SPRL. It is a company organised under the laws of the Kingdom of Belgium, and its registered office is at Boulevard de la Plaine, 9, B-1050, Brussels, Belgium.
39. *Lone Star Capital Investments S. à r. l.*: The eighth Claimant is Lone Star Capital Investments S. à r. l. It is a company organised under the laws of the Grand Duchy of Luxembourg, and its registered office is at 7 rue Robert Stumper, L-2557, Luxembourg.
40. "*Lone Star*": For ease of reference, as already mentioned above, the eight Claimants are collectively described by the Parties and below as "Lone Star," together sometimes with other Lone Star companies.
41. *The Claimants' Legal Representatives*: The Claimants were represented in this proceeding by Mr. [REDACTED] the permanent representative of the statutory managers of the Claimants, based in Brussels, Belgium; Mr. Stanimir A. Alexandrov of Stanimir A. Alexandrov PLLC based in Washington, D.C., U.S.A.; Ms. Marinn Carlson, Mr. James Mendenhall, Mr. Sam Boxerman and Mr. Andrew Shoyer of Sidley Austin LLP based in

Washington, D.C., U.S.A.; and Mr. Beomsu Kim and Mr. Eun Nyung Lee of KL Partners based in Seoul, Republic of Korea.

42. *The Respondent*: The Respondent is the Republic of Korea.
43. *The Respondent's Legal Representatives*: The Respondent was represented in this proceeding by Mr. Changwan Han, Mr. Heungsae Oh, Ms. Hyeon Song Lee and Ms. Kyuhyun Cho of the Republic of Korea's Ministry of Justice, International Dispute Settlement Division; Ms. Jean Kalicki (until late 2016), Mr. Paolo Di Rosa, Mr. Anton Ware, Ms. Mallory Silberman, Ms. Amy Endicott, Mr. Jun Hee Kim, Ms. Maria Chedid, Mr. Samuel M. Witten, Mr. Brian Bombassaro, Mr. John Muse-Fisher, Mr. Bart Wasiak, Ms. Claudia Taveras and Ms. Ana Pirnia of Arnold & Porter LLP based in Washington, D.C., U.S.A.; Mr. Kap-You ,(Kevin) Kim and Ms. Ara Cho of Peter & Kim based in Seoul, Republic of Korea; and Mr. Junu Kim, Mr. Woojae Kim and Ms. Sodam Kim of Bae, Kim & Lee LLC based in Seoul, Republic of Korea.

C. ARBITRAL TRIBUNAL

44. In accordance with ICSID Convention Article 37(2)(a), the Parties agreed that the Tribunal would consist of three arbitrators: one appointed by each Party and the President appointed by agreement of the Parties from a list of proposed candidates provided by the co-arbitrators.
45. On 22 January 2013, The Honourable Charles N. Brower, a U.S. national, accepted his appointment by the Claimants as arbitrator.
46. On 12 February 2013, Professor Brigitte Stern, a French national, accepted her appointment by the Respondent as arbitrator.
47. On 9 May 2013, following the Parties' agreement, Mr. V.V. Veeder, QC, a British national, accepted his appointment as the Tribunal President.
48. On 10 May 2013, in accordance with Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the ICSID Secretary-General notified

the Parties that the Tribunal was constituted on that date. Ms. Geraldine R. Fischer, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.

49. On 5 March 2020, following the resignation of Mr. V.V. Veeder, QC, the ICSID Secretary-General notified the Parties of the vacancy on the Tribunal and the proceeding was suspended pursuant to ICSID Arbitration Rule 10(2).
50. On 22 June 2020, The Honourable Ian Binnie, C.C., Q.C., a Canadian national, accepted his appointment as President of the Tribunal in accordance with ICSID Arbitration Rule 11(1), and the Tribunal was reconstituted. On the same date, the proceeding resumed pursuant to ICSID Arbitration Rule 12.
51. On 7 October 2020, Mr. David Campbell was appointed as the Assistant to the President of the Tribunal.

D. WRITTEN PHASE OF THE ARBITRAL PROCEDURE

52. *First Session:* On 14 June 2013, the Tribunal held a first session with the Parties by telephone conference. The Parties confirmed that the Tribunal was properly constituted and that no Party had any current objection to the appointment of any member of the Tribunal. The Parties also confirmed that (*inter alia*) the applicable ICSID Arbitration Rules would be those in force as of 10 April 2006 and the procedural language would be English.
53. *Tribunal's Decision of 8 July 2013:* On 8 July 2013, the Tribunal issued a decision regarding the Claimants' proposal to submit a "Rejoinder on Jurisdiction" permitting the Claimants to make a further application to submit such a pleading only after the submission of the Respondent's Rejoinder.
54. *Procedural Order No. 1 of 22 October 2013:* After consultation with the Parties, the Tribunal issued Procedural Order No. 1, setting out the procedure that would govern the arbitration and the timetable for the Parties' written submissions.
55. *Claimants' Memorial on the Merits of 15 October 2013:* On 15 October 2013, the Claimants filed their Memorial on the Merits (the "**Memorial**"). With this Memorial, the

Claimants adduced (*inter alia*) exhibits, legal authorities and signed witness statements and expert reports. Witness Statements were submitted from the following factual witnesses:

(i) Senator [REDACTED] dated 24 September 2013; (ii) Mr. [REDACTED] dated 14 October 2013; (iii) Mr. [REDACTED] dated 10 October 2013; (iv) Ms. [REDACTED] dated 15 October 2013; (v) Mr. [REDACTED] dated 9 October 2013; (vi) Mr. [REDACTED] 14 October 2013; (vii) Mr. [REDACTED] dated 15 October 2013; and (viii) Mr. [REDACTED] dated 12 October 2013. Expert Reports were submitted from the following expert witnesses: (i) Dr. [REDACTED] dated 10 October 2013; (ii) Mr. [REDACTED] dated 15 October 2013; (iii) Dr. [REDACTED] dated 11 October 2013; (iv) Professor [REDACTED] dated 8 October, 2013 (v) Mr. [REDACTED] dated 15 October 2013; (vi) Professor [REDACTED] dated 14 October 2013; and (vii) Professor [REDACTED] dated 10 October 2013.

56. *Tribunal's Decision on Bifurcation of 23 December 2013*: On 12 November 2013, in accordance with Procedural Order No. 1, the Respondent submitted its written Notice of Jurisdictional Objections and its Request for Bifurcation. The Claimants submitted their Opposition to Bifurcation on 27 November 2013. On 23 December 2013, the Tribunal issued its decision denying the Respondent's request for bifurcation and joined the Respondent's objections to jurisdiction to the merits pursuant to ICSID Convention Article 41(2) and ICSID Arbitration Rule 41(4).
57. *Respondent's Counter-Memorial on Jurisdiction and Merits of 21 March 2014*: On 21 March 2014, the Respondent filed its Counter-Memorial on Jurisdiction and Merits, which was subsequently corrected on 24 March 2014 (the "**Counter-Memorial**"). With this Counter-Memorial, the Respondent adduced (*inter alia*) exhibits, legal authorities and signed witness statements and expert reports. Witness Statements were submitted from the following factual witnesses: (i) Mr. [REDACTED] dated 19 March 2014; (ii) Former Prime Minister Duck-Soo Han dated 14 March 2014; (iii) Mr. Do Gon Hwang dated 19 March 2014; (iv) Dr. Kwang-Woo Jun dated 19 March 2014; (v) Mr. Dong Hoon Kang dated 19 March 2014; (vi) Mr. [REDACTED] dated 19 March 2014; (vii) Mr. Ik Nam Kim dated 19 March 2014; (viii) Mr. Jung Hoe Kim dated 20 March 2014; (ix) Mr. Myung Jun Kim dated 19 March 2014; (x) Mr. Seok-Dong Kim dated 20 March 2014; (xi) Mr. [REDACTED] dated 19 March 2014; (xii) Mr. Hae Sun Lee dated 20 March 2014; (xiii) Mr. Joo

Hyung Sohn dated 21 March 2014; and (xiv) Mr. Dai-Gou Sung dated 20 March 2014. Expert Reports were submitted from the following expert witnesses: (i) Mr. [REDACTED] of Navigant Consulting dated 21 March 2014; (ii) Professor Yong-Jae Kim dated 21 March 2014; (iii) Professors [REDACTED] and [REDACTED] dated 20 March 2014; (iv) Professor [REDACTED] dated 20 March 2014; (v) Mr. [REDACTED] dated 20 March 2014; and (vi) Professor Dr. [REDACTED] dated 21 March 2014.

58. *Procedural Order No. 2 of 2 May 2014*: The Tribunal issued Procedural Order No. 2 adopting a new procedural timetable embodying the Parties' joint proposal.
59. *Procedural Order No. 3 of 17 June 2014*: The Tribunal issued Procedural Order No. 3 concerning the production of documents by the Parties.
60. *Procedural Order No. 4 of 14 July 2014*: The Tribunal issued Procedural Order No. 4 ordering the production of certain documents and requiring both Parties to maintain and subsequently exchange a privilege log.
61. *Procedural Order No. 5 of 27 August 2014*: The Tribunal issued Procedural Order No. 5 concerning the confidential treatment of certain identified documents produced by the Parties in this arbitration. It was subsequently amended on 11 November 2014 to include an Addendum applying to "Personal Data" (as defined in Article 2 of the European Union's Data Protection Directive 95/46/EC).
62. *Procedural Order No. 6 of 19 September 2014*: The Tribunal issued Procedural Order No. 6 modifying the procedural calendar in light of the Parties' joint request.
63. *Procedural Order No. 7 of 25 September 2014*: The Tribunal issued Procedural Order No. 7 regarding (i) document production issues and (ii) the Tribunal's receipt of a letter dated 5 September 2014 addressed to it at ICSID from the Minister of Foreign and European Affairs of the Grand Duchy of Luxembourg (the "**Luxembourg Letter**"). In the Order, the Tribunal noted it would reconsider the document production requests after the Claimants' Reply, and it would treat the Luxembourg Letter as an application to file a non-disputing party submission within the meaning of ICSID Arbitration Rule 37. Consequently, the Tribunal invited the Parties to express their views in writing as to

whether such permission should be granted by the Tribunal, which the Parties submitted on 6 October 2015.

64. *The Claimants' Reply on Jurisdiction and Merits of 1 October 2014*: On 1 October 2014, the Claimants filed their Reply on Jurisdiction and Merits (the "**Reply**"). With this Reply, the Claimants adduced (*inter alia*) exhibits, legal authorities and signed witness statements and expert reports. Witness Statements were submitted from the following factual witnesses: (i) Mr. [REDACTED] dated 22 September 2014; (ii) Mr. [REDACTED] dated 24 September 2014; (iii) Senator [REDACTED] dated 3 September 2014; (iv) Mr. [REDACTED] dated 22 September 2014; (v) Mr. [REDACTED] dated 22 September 2014; (vi) Ms. [REDACTED] dated 16 September 2014; (vii) Mr. [REDACTED] dated 24 September 2014; (viii) Mr. [REDACTED] dated 24 September 2014; (ix) Mr. [REDACTED] dated 1 October 2014; and (x) Mr. [REDACTED] dated 27 September 2014. Expert Reports were submitted from the following expert witnesses: (i) Professor [REDACTED] dated 27 September 2014; (ii) Mr. [REDACTED] dated 22 September 2014; (iii) Mr. [REDACTED] dated 24 September 2014; (iv) Dr. [REDACTED] dated 23 September 2014; (v) Ms. [REDACTED] dated 18 September 2014; (vi) Dr. [REDACTED] dated 25 September 2014; (vii) Professor [REDACTED] dated 24 September 2014; (viii) Mr. [REDACTED] dated 29 September 2014; (ix) Professor [REDACTED] dated 29 September 2014; (x) Professor [REDACTED] dated 29 September 2014; (xi) Professor [REDACTED] and Dr. [REDACTED] dated 22 September 2014; and (xii) Judge [REDACTED] dated 26 September 2014.
65. *Procedural Order No. 8 of 5 January 2015*: The Tribunal issued Procedural Order No. 8 regarding (i) the Luxembourg Letter (see above); (ii) a letter dated 4 September 2014 from the Deputy Prime Minister of Foreign Affairs, Foreign Trade and European Affairs of Belgium to the Tribunal (the "**Belgium Letter**"); and (iii) a letter dated 12 May 2014 from the acting Administrator-General of Taxes of the Federal Public Service of Finance of Belgium to the Tribunal related to the Korea-Belgium Tax Treaty (the "**Belgium Tax Letter**"). These three letters were submitted as exhibits with the Claimants' Reply (*i.e.*, Exhibits C-890, C-891 and C-892). The Tribunal decided to admit these letters as exhibits

to the Claimants' Reply, but it did not accept them as falling under ICSID Arbitration Rule 37(2).

66. *Procedural Order No. 9 of 21 January 2015*: The Tribunal issued Procedural Order No. 9 regarding the Claimants' restated requests that the Tribunal order the Respondent: (i) to produce the Hana Memoranda and other Hana documentations (withheld on grounds of confidentiality and privilege); and (ii) to correct the Respondent's defects (as alleged by the Claimants) regarding the Respondent's claims of privilege over its internal governmental documents. The Tribunal decided to appoint a Special Referee to examine the withheld or redacted documents in light of the written submissions made and/or to be made by the Parties regarding privilege and confidentiality; and it set out a basic procedure for the Special Referee's examination.
67. *Respondent's Rejoinder on Jurisdiction and Merits of 23 January 2015*: The Respondent filed its Rejoinder on Jurisdiction and Merits (the "**Rejoinder**"). With this Rejoinder, the Respondent adduced (*inter alia*) exhibits, legal authorities and witness statements and expert reports. Witness Statements were submitted from the following factual witnesses: (i) Mr. [REDACTED] dated 16 January 2015; (ii) Mr. Kyubum Cho dated 20 January 2015; (iii) Former Prime Minister Duck-Soo Han dated 16 January 2015; (iv) Mr. Do Gon Hwang dated 20 January 2015; (v) Mr. Jin-Kyu Jeong dated 16 January 2015; (vi) Mr. Seoungho Jin dated 20 January 2015; (vii) Dr. Kwang-Woo Jun dated 15 January 2015; (viii) Mr. [REDACTED] dated 16 January 2015; (ix) Mr. Donghyon Kim dated 16 January 2015; (x) Deputy Governor Jung Hoe Kim dated 16 January 2015; (xi) Mr. Myung Jun Kim dated 21 January 2015; (xii) Mr. Seok-Dong Kim dated 15 January 2015; (xiii) Mr. [REDACTED] dated 16 January 2015; (xiv) Mr. Taeho Kim dated 16 January 2015; (xv) Mr. Taeshin Kwon dated 16 January 2015; (xvi) Mr. Hae Sun Lee dated 15 January 2015; (xvii) Mr. In-Ki Lee dated 20 January 2015; (xviii) Mr. Jae-Yong Lee dated 16 January 2015; (xix) Mr. Young Joo Lee dated 20 January 2015; (xx) Mr. Saechun Park dated 16 January 2015; (xxi) Mr. Yunjun Park dated 20 January 2015; (xxii) Mr. Joo Hyung Sohn dated 15 January 2015; (xxiii) Mr. Dai-Gou Sung dated 19 January 2015; and (xxiv) Mr. Bongho Yang dated 20 January 2015. Expert Reports were submitted from the following expert witnesses: (i) Mr. [REDACTED] dated 22 January 2015;

- (ii) Professor [REDACTED] dated 23 January 2015; (iii) Ms. [REDACTED] dated 18 January 2015; (iv) Mr. [REDACTED] of Navigant Consulting dated 23 January 2015; (v) Professors [REDACTED] and [REDACTED] dated 16 January 2015; (vi) Professor Yong-Jae Kim dated 15 January 2014; (vii) Professor [REDACTED] dated 16 January 2015; (viii) Professor [REDACTED] dated 20 January 2015; (ix) Mr. [REDACTED] dated 23 January 2015; and (x) Professor Dr. [REDACTED] dated 23 January 2015.
68. *Procedural Order No. 10 of 12 March 2015*: The Tribunal issued Procedural Order No. 10 granting the Claimants permission to file a (succinct) Sur-Reply on Jurisdiction, confined to matters responding to the Respondent's Rejoinder on Jurisdiction and Merits, by 31 March 2015. By this order, the Tribunal further confirmed the "Special Referee procedure" set forth in Procedural Order No. 9, appointed an individual to act as Special Referee (who would be identified separately) and gave instructions regarding the procedure to be followed by the Special Referee and the Parties. The Tribunal also decided there would be simultaneous interpretation at the Hearing(s) and that, in principle, time at the Hearing(s) would be allocated equally between the Parties.
69. *Claimants' Sur-Reply on Jurisdiction of 31 March 2015*: On 31 March 2015, in accordance with Procedural Order No. 10, the Claimants filed their Sur-Reply on Jurisdiction (the "Sur-Reply"). With this Sur-Reply, the Claimants adduced (*inter alia*) exhibits, legal authorities and expert reports. Expert Reports were submitted from the following expert witnesses: (i) Professor [REDACTED] dated 31 March 2015; (ii) Professor [REDACTED] and Dr. [REDACTED] dated 11 March 2015; and (iii) Judge [REDACTED] dated 30 March 2015.
70. *Pre-Hearing Organisational Meeting*: On 30 April 2015, by agreement of the Parties, the President of the Tribunal held a pre-Hearing organisational meeting with the Parties by telephone conference.
71. *Special Referee*: Further to Procedural Order No. 10, by letter of 31 March 2015, the Secretary of the Tribunal informed the Parties that the Tribunal had appointed The Honourable [REDACTED] P.C., O.C., Q.C. to act as Special Referee. Mr. [REDACTED] made

the following disclosure to the Parties: "I was appointed by the Claimant in an ICC commercial case between LSF KEB Holdings SCA (Belgium) and Korea Exchange Bank. The case started in 2012 and an award was rendered in 2014. The Claimant was represented by Sidley Austin." No Party raised an objection to Mr. [REDACTED] appointment.

72. In the same letter dated 31 March 2015, the Parties were informed that the Tribunal approved the Parties' respective lists of twenty-five documents to be examined by the Special Referee, and were invited to send the relevant documentation only to the Special Referee (not the Tribunal).
73. On 2 April 2015, the Parties were sent Mr. [REDACTED] confidentiality undertaking and an undertaking that he was independent of the Parties and impartial. On that same day, the Parties were asked to send any observations regarding the Special Referee appointment. Later that day, the Respondent sent its observations noting that "[i]n the interests of moving forward, and out of the greatest respect for both Mr. [REDACTED] and this Tribunal, we do not challenge the Tribunal's decision [to appoint Mr. [REDACTED]
74. On 1 April 2015, the Claimants forwarded a set of twenty-five documents that were requested by the Respondent, three of which needed translation from the Korean language into English, and also underscored that all twenty-five of the Respondent's documents would need translation. Given the previous disagreement between the Parties regarding translation issues, the Tribunal decided to engage neutral professional translators to review the English translations and modify them (as needed), before they were transmitted to the Special Referee. As a result, the Special Referee received a full set of the fifty documents (translated into English) on 29 April 2015.
75. On 14 April 2015, the Parties jointly submitted two large volumes of reference materials containing written submissions relating to the Claimants' withheld documents, submissions relating to the Respondent's withheld or redacted documents, submissions relating to the Tribunal's proposed Special Referee procedures and the relevant procedural orders.

76. On 30 April 2015, after the Special Referee's approval, the Respondent submitted English translations of legal memoranda supporting its assertion of privilege. The Special Referee then held a telephone conference with Counsel for the Claimants on 22 April 2015 and Counsel for the Respondent on 5 May 2015. As instructed by the Tribunal, the Special Referee reviewed the Parties' objections based on legal privilege and/or confidentiality within the meaning of the IBA Rules.
77. On 8 May 2015, the Secretary of the Tribunal transmitted to the Parties the "Report of the Special Referee," whereby the Special Referee issued his decisions on the documents that he had examined.
78. *Procedural Order No. 11 of 12 May 2015*: On 12 May 2015, the Tribunal issued Procedural Order No. 11 ordering the Claimants and the Respondent to produce the documents and passages of documents in accordance with the Special Referee's decision as soon as possible.
79. *Third-Party Requests to Attend Hearings*: By letters dated 7 May 2015, 2 June 2015, 16 November 2015 and 2 February 2016 the Members of the International Trade Committee of 'MINBYUN' – Lawyers for a Democratic Society requested the Tribunal's permission to attend Phase I, Phase II, Phase III and Phase IV of the Hearings, pursuant to ICSID Arbitration Rule 32(2). Similarly, by letter of 11 May 2015, the Korea Center for Investigative Journalism also requested permission to attend Phase I of the Hearing. In addition, on 7 June 2015, Mr. Je Nam Kim, a Member of the National Assembly of the Republic of Korea, requested permission to attend Phase II of the Hearing pursuant to ICSID Arbitration Rule 32(2). On 20 April 2016, *Maeil Business Newspaper*, a media outlet in Seoul, Korea, requested permission to attend Phase IV of the Hearing. Upon the Tribunal's consultations with the Parties, the Parties stated their objections to the presence of third persons at the Hearings. Accordingly, the Tribunal could not accept any third-party requests under ICSID Arbitration Rule 32(2) and so informed the requesting third parties.

E. PHASE I OF THE HEARING (ORAL PHASE)

80. A first Hearing on the Merits (Phase I) took place at the World Bank in Washington D.C., U.S.A., from 15 to 22 May 2015 (the “**Phase I Hearing**”). It was recorded by verbatim daily transcript. In addition to the three Members of the Tribunal and the Secretary of the Tribunal, the Court Reporter, and the Interpreters, those present at the Phase I Hearing were:

For the Claimants:

The Claimants’ Counsel

| | |
|----------------------------|-------------------|
| Mr. Stanimir A. Alexandrov | Sidley Austin LLP |
| Mr. Andrew Blandford | Sidley Austin LLP |
| Mr. Samuel Boxerman | Sidley Austin LLP |
| Ms. Marinn Carlson | Sidley Austin LLP |
| Mr. Patrick Childress | Sidley Austin LLP |
| Ms. Courtney Hikawa | Sidley Austin LLP |
| Mr. Michael Krantz | Sidley Austin LLP |
| Mr. Kang Woo Lee | Sidley Austin LLP |
| Mr. James Mendenhall | Sidley Austin LLP |
| Mr. Grady Nye | Sidley Austin LLP |
| Mr. Andrew Shoyer | Sidley Austin LLP |
| Ms. Avery Archambo | Sidley Austin LLP |
| Mr. Caleb Raspler | Sidley Austin LLP |
| Ms. Samantha Taylor | Sidley Austin LLP |
| Mr. Sang Hoon Han | Shin & Kim |
| Mr. Beomsu Kim | Shin & Kim |
| Mr. David Kim | Shin & Kim |
| Mr. Doo Sik Kim | Shin & Kim |
| Mr. John M. Kim | Shin & Kim |
| Mr. Eun Nyung Lee | Shin & Kim |

The Claimants’ Representatives

| | |
|----------------|-----------------|
| Mr. [REDACTED] | Lone Star Funds |
| Ms. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Lone Star Funds |

The Claimants’ Factual Witnesses

| | |
|----------------|---------------------------|
| Mr. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Pivot Investment Partners |
| Mr. [REDACTED] | Kildare Partners |
| Mr. [REDACTED] | American Savings Bank |

The Respondent's Representatives

| | |
|--------------------|--------------------------------------|
| Ms. Huy Kyung Byun | Korean Ministry of Justice |
| Mr. Jae-Woong Kang | Korean Ministry of Justice |
| Mr. Chul Soo Kim | Korean Ministry of Justice |
| Ms. Ji Un Kim | Korean Ministry of Justice |
| Ms. Mi Ri Ryu | Korean Ministry of Justice |
| Mr. Jaeyong Jeong | Korean Ministry of Justice |
| Ms. A Ra Jo | Korean Ministry of Justice |
| Mr. Sung Jin Park | Korean National Tax Service |
| Mr. Kwang Min Kim | Korean National Tax Service |
| Mr. Kihyun Park | Korean Financial Supervisory Service |
| Mr. Suk-Rin Hong | Korean Financial Supervisory Service |
| Ms. Minhae Ryu | Korean Financial Supervisory Service |
| Mr. Byounghee Park | Korean Financial Supervisory Service |
| Mr. Sang Rok Shin | Korean Financial Services Commission |
| Ms. Hye Sun Joung | Korean Financial Services Commission |
| Mr. Juyoung Park | Korean Financial Services Commission |

The Respondent's Factual Witnesses

| | |
|--------------------|--------------------------------------|
| Mr. [REDACTED] | Hana Institute of Finance |
| Mr. Jae-yong Lee | Korean Financial Supervisory Service |
| Dr. Kwang-Woo Jun | Yonsei University |
| Mr. [REDACTED] | Hana Financial Group |
| Mr. [REDACTED] | China Minsheng Bank |
| Mr. Joo Hyung Sohn | Korean Financial Services Commission |
| Mr. Hae Sun Lee | Korean Financial Services Commission |
| Mr. Seok-Dong Kim | Korean Financial Services Commission |
| Mr. Sae Chun Park | Korean Financial Supervisory Service |
| Mr. Dyonghyon Kim | Korean Financial Supervisory Service |

The Respondent's Expert Witnesses

| | |
|------------------------|---------------------------|
| Mr. [REDACTED] | Johns Hopkins University |
| Professor [REDACTED] | Seoul National University |
| Professor [REDACTED] | Seoul National University |
| Professor Yong-Jae Kim | Korea University |
| Mr. [REDACTED] | World Bank Consultant |

81. Oral Testimony (Phase I): At the Phase I Hearing, the Tribunal heard oral testimony from the following factual and expert witnesses, subject to cross-examination, as recorded in the verbatim transcript.²⁵

²⁵ Key to transcript references: [examination-in-chief (i.e., direct ("x")); cross ("xx"); redirect ("xxx")] TD[day number].[page number].

For the Claimants:

Mr. [REDACTED] [x TD2.312, xx TD2.314, xxx TD2.476]
Mr. [REDACTED] [x TD2.497, xx TD2.504 xxx TD2.597]
Mr. [REDACTED] [x TD2.612, xx TD2.617, xxx TD3.659]
Mr. [REDACTED] [x TD3.662, xx TD3.673, xxx TD3.751]
Mr. [REDACTED] [x TD3.802, xx TD3.820, xxx TD3.885]
Mr. [REDACTED] [x TD4.1038, xx TD4.1039, xxx TD4.1149]
Professor [REDACTED] [x TD8.1947, xx TD8.1950, xxx TD8.2064]

For the Respondent:

Dr. Kwang-Woo Jun [x TD5.1194, xx TD5.1197, xxx TD5.1373]
Mr. Hae Sun Lee [x TD5.1389, xx TD5.1394, xxx TD6.1482]
Mr. Jae-Yong Lee [x TD6.1494, xx TD6.1496]
Mr. Dyonghyon Kim [x TD6.1515, xx TD6.1516]
Mr. Sae Chun Park [x TD6.1552, xx TD6.1555, xxx TD6.1609]
Mr. [REDACTED] [x TD6.1623, xx TD6.1635, xxx TD7.1733]
Mr. [REDACTED] [x TD7.1772, xx TD7.1774]
Mr. [REDACTED] [x TD7.1801, xx TD7.1805]
Mr. Joo Hyung Sohn [x TD7.1835, xx TD7.1839, xxx TD7.1876]
Mr. Seok-Dong Kim [x TD7.1879, xx TD7.1885]
Professor Yong-Jae Kim [x TD8.2088, xx TD8.2095, xxx TD8.2169]

82. The Parties' Counsel also made oral submissions, as follows:

Claimants' Opening Statement [TD1.9]
Respondent's Opening Statement [TD1.127]

83. *Procedural Order No. 12 of 18 May 2015*: During the Phase I Hearing, the Tribunal issued Procedural Order No. 12 ordering the Respondent to produce the FSC Commission meeting transcript of 27 January 2012 related to the Hana application.
84. *Procedural Order No. 13 of 27 May 2015*: The Tribunal issued Procedural Order No. 13 granting the Respondent's application to introduce the U.S. Federal Reserve document of 30 April 2015 into the evidential record. By this order, the Tribunal also reaffirmed its 4 May 2015 decision to request Ms. [REDACTED] and Mr. [REDACTED] to attend the Hearing to hear the oral testimony of Mr. [REDACTED] and Mr. [REDACTED]. The Tribunal further noted that it might require Ms. [REDACTED] and Mr. [REDACTED] possibly with Mr. [REDACTED] and Mr. [REDACTED] to participate in an "expert witness conference."

85. *Procedural Order No. 14 of 18 June 2015*: The Tribunal issued Procedural Order No. 14 concerning procedural matters related to Phases II and III of the Hearing.

F. PHASE II OF THE HEARING (ORAL PHASE)

86. A second Hearing on the Merits (Phase II) took place at the World Bank in Washington, D.C., U.S.A., from 29 June to 7 July 2015 (the "**Phase II Hearing**"). It was recorded by verbatim daily transcript. In addition to the three Members of the Tribunal and the Secretary of the Tribunal, the Court Reporter, and the Interpreters, those present at the Phase II Hearing were:

For the Claimants:

The Claimants' Counsel

| | |
|----------------------------|-------------------|
| Mr. Stanimir A. Alexandrov | Sidley Austin LLP |
| Mr. Andrew Blandford | Sidley Austin LLP |
| Mr. Samuel Boxerman | Sidley Austin LLP |
| Ms. Marinn Carlson | Sidley Austin LLP |
| Mr. Patrick Childress | Sidley Austin LLP |
| Ms. Courtney Hikawa | Sidley Austin LLP |
| Mr. Michael Krantz | Sidley Austin LLP |
| Mr. Kang Woo Lee | Sidley Austin LLP |
| Mr. James Mendenhall | Sidley Austin LLP |
| Mr. Andrew Shoyer | Sidley Austin LLP |
| Ms. Lauren Dayton | Sidley Austin LLP |
| Ms. Maxime Gros | Sidley Austin LLP |
| Ms. Riana Terney | Sidley Austin LLP |
| Ms. Lindsay Walter | Sidley Austin LLP |
| Ms. Avery Archambo | Sidley Austin LLP |
| Mr. Caleb Raspler | Sidley Austin LLP |
| Ms. Samantha Taylor | Sidley Austin LLP |
| Mr. Beomsu Kim | Shin & Kim |
| Mr. John M. Kim | Shin & Kim |
| Mr. Eun Nyung Lee | Shin & Kim |

The Claimants' Representatives

| | |
|----------------|---|
| Ms. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Lone Star Investment Management SPRL |

The Respondent's Representatives

| | |
|--------------------|---|
| Mr. Chul Soo Kim | Korean Ministry of Justice |
| Ms. Huy Kyung Byun | Korean Ministry of Justice |
| Ms. Ji Un Kim | Korean Ministry of Justice |
| Ms. Mi Ri Ryu | Korean Ministry of Justice |
| Ms. A Ra Jo | Korean Ministry of Justice |
| Mr. Kunho Bae | Korean Ministry of Justice |
| Mr. Junsung Kim | Korean Ministry of Justice |
| Mr. Kwang Min Kim | Korean National Tax Service |
| Mr. Sung Jae Lee | Korean National Tax Service |
| Mr. Jae Hyung Park | Korean National Tax Service |
| Mr. Sang Chul Chae | Korean National Tax Service |
| Mr. Yong Jin Park | Korean National Tax Service |
| Mr. Dong Hyun Ryoo | Korean National Tax Service |
| Mr. Sang Rok Shin | Korean Financial Services Commission |
| Mr. Seongik Jeon | Korean Ministry of Strategy and Finance |

The Respondent's Factual Witnesses

| | |
|--------------------|-----------------------------|
| Mr. Do Gon Hwang | Korean National Tax Service |
| Mr. Myung Jun Kim | Korean National Tax Service |
| Mr. Bongho Yang | Korean National Tax Service |
| Mr. Dong Hoon Kang | Korean National Tax Service |
| Mr. Inki Lee | Korean National Tax Service |

The Respondent's Expert Witnesses

| | |
|-------------------------|---|
| Mr. [REDACTED] | Johns Hopkins University |
| Professor [REDACTED] | Hanyang University |
| Professor Dr [REDACTED] | University of Amsterdam |
| Mr. [REDACTED] | Navigant Consulting |
| Mr. [REDACTED] | Navigant Consulting |
| Ms. [REDACTED] | Navigant Consulting |
| Ms. [REDACTED] | Navigant Consulting |
| Mr. [REDACTED] | World Bank Financial Integrity Department |

87. *Oral Testimony (Phase II)*: At the Phase II Hearing, the Tribunal heard oral testimony from the following factual and expert witnesses:

For the Claimants:

| | |
|----------------------|--|
| Mr. [REDACTED] | [x TD9.2222, xx TD9.2237, xxx TD9.2413] |
| Mr. [REDACTED] | [x TD10.2821, xx TD10.2823, xxx TD11.2979] |
| Mr. [REDACTED] | [x TD11.3027, xx TD11.3032; xxx TD11.3089] |
| Professor [REDACTED] | [x TD13.3596, xx TD13.3602, xxx TD14.3866] |
| Professor [REDACTED] | [x TD15.4029, xx TD15.4042, xxx TD15.4119] |

For the Respondent:

Mr. [REDACTED] [x TD9.2433, xx TD9.2450, xxx TD10.2560]
Mr. Myung Jun Kim [x TD11.3104, xx TD11.3113, xxx TD11.3154]
Mr. Do Gon Hwang [x TD12.3192, xx TD12.3198, xxx TD12.3334]
Mr. Dong Hoon Kang [x TD12.3350, xx TD12.3353, xxx TD13.3419]
Mr Bongho Yang [x TD13.3440, xx TD13.3445, xxx TD13.3539]
Mr. Inki Lee [x TD13.3571, xx TD13.3572, xxx TD13.3592]
Professor [REDACTED] [x TD14.3779, xx TD14.3789]
Mr. [REDACTED] [x TD16.4137, xx TD16.4154, xxx TD.164242]

88. The Parties' Counsel also made oral submissions, as follows:

Claimants' Opening Argument on Damages [TD15.3888]
Respondent's Opening Argument on Damages [TD15.3950]

89. *Further Third-Party Request:* On 30 November 2015, MINBYUN submitted a "Request for an Amicus Curiae Written Submission as Non-disputing Party" according to ICSID Arbitration Rule 37(2) ("**MINBYUN's First Request**"). That same day, the Tribunal's Secretary transmitted a copy of the Request to the Tribunal and the Parties. Pursuant to ICSID Arbitration Rule 37(2) requiring consultation with the Parties, the Tribunal invited the Parties to submit their respective observations on MINBYUN's Request. The Parties submitted their respective observations in writing on 11 December 2015.
90. *Procedural Order No. 15 of 21 December 2015:* After considering the Parties' observations, the Tribunal denied MINBYUN's First Request. In the Tribunal's view, if MINBYUN's Request were granted, it would disrupt the proceedings and unduly burden or unfairly prejudice the Parties. Granting MINBYUN's Request would likely cause Phase III of the Hearing to be adjourned or, at least, require a separate phase at significant time and cost to the Parties. Moreover, the Tribunal was not persuaded that MINBYUN had a perspective, particular knowledge or insight that was materially different from that of the Parties, particularly their Counsel and expert witnesses.

G. PHASE III OF THE HEARING (ORAL PHASE)

91. A third Hearing on Jurisdiction took place in The Hague, Netherlands, from 5 to 8 January 2016 (the "**Phase III Hearing**"). It was recorded by a verbatim daily transcript. In addition to the three Members of the Tribunal and the Acting Secretary of the Tribunal, Ms. Jara

Mínguez Almeida, the Court Reporter and the Interpreters, those present at the Phase III Hearing were:

For the Claimants:

The Claimants' Counsel

| | |
|----------------------------|-------------------|
| Mr. Stanimir A. Alexandrov | Sidley Austin LLP |
| Ms. Marinn Carlson | Sidley Austin LLP |
| Mr. James Mendenhall | Sidley Austin LLP |
| Mr. Judah Ariel | Sidley Austin LLP |
| Mr. Andrew Blandford | Sidley Austin LLP |
| Mr. Michael Krantz | Sidley Austin LLP |
| Mr. Beomsu Kim | KL Partners |
| Mr. John M. Kim | KL Partners |

The Claimants' Representatives

| | |
|----------------|-----------------|
| Ms. [REDACTED] | Lone Star Funds |
| Mr. [REDACTED] | Lone Star Funds |

For the Respondent:

The Respondent's Counsel

| | |
|-------------------------|---------------------|
| Mr. Brian Bombassaro | Arnold & Porter LLP |
| Ms. Jean Choi | Arnold & Porter LLP |
| Mr. Paolo Di Rosa | Arnold & Porter LLP |
| Ms. Amy Endicott | Arnold & Porter LLP |
| Ms. Jean Kalicki | Arnold & Porter LLP |
| Ms. Bailey Roe | Arnold & Porter LLP |
| Ms. Aimee Reilert | Arnold & Porter LLP |
| Mr. Csaba Rusznak | Arnold & Porter LLP |
| Ms. Mallory Silberman | Arnold & Porter LLP |
| Mr. Anton Ware | Arnold & Porter LLP |
| Mr. Sam Witten | Arnold & Porter LLP |
| Mr. John P. Bang | Bae, Kim & Lee LLC |
| Ms. Ara Cho | Bae, Kim & Lee LLC |
| Mr. Junu Kim | Bae, Kim & Lee LLC |
| Mr. Kevin (Kap-You) Kim | Bae, Kim & Lee LLC |
| Mr. Seokchun Yun | Bae, Kim & Lee LLC |

The Respondent's Representatives

| | |
|--------------------|---------------------|
| Mr. Chul Soo Kim | Ministry of Justice |
| Ms. Ji Un Kim | Ministry of Justice |
| Ms. Miri Ryu | Ministry of Justice |
| Mr. Jaeyong Jeong | Ministry of Justice |
| Mr. Jae Woong Kang | Ministry of Justice |
| Mr. Kunho Bae | Ministry of Justice |

| | |
|--------------------|-------------------------------|
| Ms. A Yong Lim | Ministry of Justice |
| Mr. Sun Young Jin | Financial Services Commission |
| Mr. Suam Lee | Financial Services Commission |
| Mr. Suk-Rin Hong | Financial Supervisory Service |
| Mr. Kihyun Park | Financial Supervisory Service |
| Ms. Hye Sun Joung | Financial Supervisory Service |
| Ms. Eunok Lee | Ministry of Foreign Affairs |
| Mr. Jaehyung Park | National Tax Service |
| Mr. Kwangmin Kim | National Tax Service |
| Mr. Wonbong Jang | National Tax Service |
| Mr. Kyumyung Jeong | National Tax Service |
| Ms. Huykyung Byun | National Tax Service |
| Mr. Sungjae Lee | National Tax Service |

The Claimants' Expert Witnesses (who did not testify at this Phase III Hearing)

| | |
|----------------|------------------------|
| Mr. [REDACTED] | PricewaterhouseCoopers |
| Mr. [REDACTED] | Ewha Womans University |

92. The Parties' Counsel also made oral submissions, as follows:

Respondent's Closing Argument on Jurisdiction [TD17.4264]

Claimants' Closing Argument on Jurisdiction [TD18.4413]

93. *Procedural Order No. 16 of 7 April 2016*: The Tribunal issued Procedural Order No. 16 concerning procedural matters related to the Phase IV Hearing. It confirmed that this Hearing would be confined to the issues relating to banking, tax and quantum (*i.e.*, not jurisdiction).

H. PHASE IV OF THE HEARING (ORAL PHASE)

94. A fourth Hearing (Phase IV) took place in The Hague, Netherlands, from 2 to 3 June 2016 (the "**Phase IV Hearing**"). It was recorded by a verbatim daily transcript. In addition to the three Members of the Tribunal and the Secretary of the Tribunal, the Assistant to The Honourable Charles N. Brower, the Court Reporter and the Interpreters, those present at the Phase IV Hearing were:

For the Claimants:

The Claimants' Counsel

| | |
|----------------------------|-------------------|
| Mr. Stanimir A. Alexandrov | Sidley Austin LLP |
| Ms. Marinn Carlson | Sidley Austin LLP |
| Mr. James Mendenhall | Sidley Austin LLP |

Mr. Andrew Blandford
Mr. Michael Krantz
Mr. Beomsu Kim
Mr. John M. Kim
Mr. Eun Nyung Lee

Sidley Austin LLP
Sidley Austin LLP
KL Partners
KL Partners
KL Partners

The Claimants' Representatives

Ms. [REDACTED]
Mr. [REDACTED]

Lone Star Funds
Lone Star Funds

For the Respondent:

The Respondent's Counsel

Ms. Jean Kalicki
Mr. Kelby Ballena
Mr. Brian Bombassaro
Ms. Jean Choi
Mr. Paolo Di Rosa
Ms. Aimee Reilert
Mr. Csaba Rusznak
Ms. Mallory Silberman
Mr. Anton Ware
Mr. Sam Witten
Mr. Kevin (Kap-You) Kim
Mr. John P. Bang
Mr. Junwoo Kim
Ms. Sue Hyun Lim
Ms. Ara Cho Bae

Independent Senior Consultant
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Arnold & Porter LLP
Bae, Kim & Lee LLC
Bae, Kim & Lee LLC
Bae, Kim & Lee LLC
Bae, Kim & Lee LLC
Kim & Lee LLC

The Respondent's Representatives

Mr. Sang-Yeop Koo
Ms. Ji Un Kim
Ms. Miri Ryu
Mr. Jae-Woong Kang
Mr. Jeongwoo Kang
Mr. Ahrham Kim
Ms. Ayoung Lim
Mr. Yunsu Rhee
Mr. Suam Lee
Mr. Youngoh Chi
Mr. Kihyun Park
Ms. Hye Sun Joung
Mr. Sang-Woo Lee
Ms. Huy-Kyung Byun
Mr. Kwang-Min Kim
Mr. Won-Bong Jang

Ministry of Justice
Ministry of Justice
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Ministry of Justice
Ministry of Justice
Financial Services Commission
Financial Services Commission
Financial Supervisory Service
Financial Supervisory Service
Financial Supervisory Service
National Tax Service
National Tax Service
National Tax Service
National Tax Service

Ms. Ji-Hyun Park
Ms. Eunok Lee
Ms Hyunju Shin

National Tax Service
Ministry of Foreign Affairs
Ministry of Foreign Affairs

The Respondent's Experts

Mr. [REDACTED]
Mr. [REDACTED]
Mr. [REDACTED]

Seoul National University
Hanyang University
PricewaterhouseCoopers

95. The Parties' Counsel also made oral closing submissions, as follows:

Claimants' Closing Statement [TD20.4780]
Respondent's Closing Statement [TD21.5067]

I. POST-PHASE IV OF THE HEARING

96. The Parties jointly wrote to the Tribunal on 27 July 2016 to inform the Tribunal that they agreed to send their Costs Schedules in an agreed format by 29 July 2016, and they subsequently did. Upon invitation from the Tribunal, on 16 May 2022, each Party provided an updated Costs Schedule; the Claimants' Costs Schedule amounts to USD 37,311,934.14, while the Respondent's Costs Schedule amounts to USD 29,044,621.80; KRW 11,689,808,017.00 (which the Respondent lists as approximately USD 9,059,601.00); and EUR 35,727.50 (which the Respondent lists as approximately USD 37,148.00).
97. *Procedural Order No. 17 of 1 August 2016*: The Tribunal issued Procedural Order No. 17, concerning the Parties' written costs submissions: each Party was to submit comments on the allocation and assessment of costs, not to exceed five single-spaced pages by 15 August 2016 with no right of reply.
98. *Cost Submissions*: Further to Procedural Order No. 17, each Party filed a written submissions on the issue of costs, on 15 August 2016.
99. *Further Third-Party Request*: On 18 December 2018, MINBYUN submitted a "Second Request for an Amicus Curiae Written Submission as Non-disputing Party" according to ICSID Arbitration Rule 37(2) ("**MINBYUN's Second Request**"). That same day, the Tribunal's Secretary transmitted a copy of the MINBYUN's Second Request to the Tribunal.

100. *Procedural Order No. 18 of 11 February 2019*: The Tribunal issued Procedural Order No. 18, concerning: (i) the testimony of certain FSC witnesses adduced in this ICSID arbitration; (ii) the Claimants' pending application in *LSF-KEB Holdings SCA v. Hana Financial Group, Inc.*, ICC Case No. 2221/CYK/PTA (the "**ICC Arbitration**"), regarding the testimony of certain Hana witnesses; (iii) the ICC Arbitration and this Tribunal's Award; (iv) co-ordination between the ICC Arbitration and this ICSID arbitration as to the timing of their respective awards; (v) MINBYUN's Second Request; and (vi) the pending Korean tax proceedings. With respect to MINBYUN's Second Request, in this Procedural Order No. 18, pursuant to ICSID Arbitration Rule 37(2), the Tribunal invited the Parties to submit their written observations by 28 February 2019.
101. *Procedural Order No. 19 of 8 April 2019*: After considering the Parties' observations, the Tribunal incorporated by reference the terms of Procedural Order No. 15 in which it denied MINBYUN's First Request and rejected MINBYUN's Second Request as the situation had not materially changed, except for the arbitration's more advanced stage, which made the Second Request even more inappropriate.
102. *Procedural Order No. 20 of 15 April 2019*: The Tribunal issued Procedural Order No. 20 determining that the testimony of the FSC officials (both written and oral) is to be treated as "Confidential Information" in accordance with Procedural Order No. 5, and that therefore the Claimants are precluded "from presenting the FSC officials' testimony to the ICC tribunal in the ICC Arbitration."
103. *Procedural Order No. 21 of 22 May 2019*: The Tribunal issued Procedural Order No. 21 concerning the Claimants' application for the Charging Documents to be produced by the Respondent and the Respondent's application in regard to the final award rendered on 13 May 2019 in the ICC Arbitration (the "**ICC Award**").
104. *Procedural Order No. 22 of 29 May 2019*: The Tribunal issued Procedural Order No. 22 concerning the ICC Award and the Respondent's renewed application regarding the testimony of the Hana executives in the ICC Arbitration.

105. *Procedural Order No. 23 of 12 June 2019*: The Tribunal issued Procedural Order No. 23 concerning the ICC Award.
106. *Procedural Order No. 24 of 19 July 2019*: The Tribunal issued Procedural Order No. 24 concerning the Charging Documents, the ICC Award and the testimony of the Hana executives in the ICC Arbitration between LSF-KEB and Hana.
107. *Procedural Order No. 25 of 15 January 2020*: The Tribunal issued Procedural Order No. 25 granting the Claimants' application to admit the ICC Award into the record and inviting the Parties to submit simultaneous briefs by 5 February 2020; the deadline was subsequently extended to 12 February 2020, and the Parties submitted their briefs on that date. Furthermore, having reviewed the ICC Award *de bene esse*, the Tribunal denied the Claimants' application to admit the Hana executives' testimony adduced in the ICC arbitration as the important portions of such testimony should be contained in the ICC Award.
108. Following the reconstitution of the Tribunal, on 14 and 15 October 2020, a hearing was held by videoconference with the Tribunal, the Secretary of the Tribunal, the Assistant to the President of the Tribunal, the Assistant to The Honourable Charles N. Brower, the Court Reporter, and the following persons:

For the Claimants:

The Claimants' Counsel

| | |
|----------------------------|-----------------------------|
| Mr. Stanimir A. Alexandrov | Stanimir A. Alexandrov PLLC |
| Ms. Marinn Carlson | Sidley Austin LLP |
| Mr. Michael Krantz | Sidley Austin LLP |
| Mr. Gavin Cunningham | Sidley Austin LLP |
| Mr. Earle Anderson | Sidley Austin LLP |
| Mr. Paul David Avila | Sidley Austin LLP |
| Mr. Beomsu Kim | KL Partners |
| Mr. Eun Nyung Lee | KL Partners |
| Mr. Young Suk Park | KL Partners |

The Claimants' Representatives

| | |
|----------------|-----------|
| Ms. [REDACTED] | Lone Star |
| Mr. [REDACTED] | Lone Star |

For the Respondent:

The Respondent's Counsel

| | |
|-----------------------|---------------------|
| Mr. Paolo Di Rosa | Arnold & Porter LLP |
| Mr. Anton A. Ware | Arnold & Porter LLP |
| Ms. Mallory Silberman | Arnold & Porter LLP |
| Mr. Jun Hee Kim | Arnold & Porter LLP |
| Mr. Samuel M. Witten | Arnold & Porter LLP |
| Ms. Amy Endicott | Arnold & Porter LLP |
| Mr. Brian Bombassaro | Arnold & Porter LLP |
| Mr. John Muse-Fisher | Arnold & Porter LLP |
| Mr. Bart Wasiak | Arnold & Porter LLP |
| Ms. Ana Pirnia | Arnold & Porter LLP |
| Mr. Kelby Ballena | Arnold & Porter LLP |
| Mr. John Bang | BKL |
| Mr. Junu Kim | BKL |
| Mr. Kevin Kim | Peter & Kim |
| Ms. Ara Cho | Peter & Kim |

The Respondent's Representatives

| | |
|--------------------|---|
| Mr. Sung Kook Kang | Deputy Minister for Legal Affairs / Ministry of Justice |
| Mr. Changwan Han | Director / Ministry of Justice |
| Mr. Heung Sae Oh | Public Prosecutor / Ministry of Justice |
| Ms. Hyeon Song Lee | Senior Deputy Director / Ministry of Justice |
| Mr. Kyuhyun Cho | Deputy Director / Ministry of Justice |
| Mr. Hyungjoo Lee | Deputy Director / Ministry of Justice |
| Mr. Youngjick Lee | Director General / Financial Services Commission |
| Mr. Suam Lee | Deputy Director / Financial Services Commission |
| Mr. Ryonho Kang | Deputy Director / Financial Services Commission |
| Mr. In-Soon Choi | Director of International Taxation Division / National Tax Service |
| Mr. Junho Kim | Deputy Director / National Tax Service |
| Ms. Min Kyong Cho | Deputy Director / National Tax Service |
| Mr. Seunghun Shin | Deputy Director / Ministry of Economy and Finance |
| Ms. Mijoo Hyun | Director / Ministry of Foreign Affairs |
| Ms. Eunyong Choi | Director / Ministry of Foreign Affairs |
| Ms. Jeeyoung Ha | Second Secretary / Ministry of Foreign Affairs |

J. CLOSURE OF THE PROCEEDING

109. Pursuant to ICSID Arbitration Rule 38(1), by letter dated 28 June 2022, the Tribunal declared this proceeding closed.

III. INTRODUCTION TO THE PARTIES

110. In the wake of the Asian financial crisis of 1997–1998, Korea became attractive to foreign capital. The surge in foreign investment can be seen in the ownership of Korean banking shares: in 1998, 12% of Korean bank shares were in foreign hands; this increased to 21% in 1999, 27% by 2001 and 45% by 2003.²⁶
111. In April 2004, Carlyle Group had sold the Hanmi Bank for capital gains of KRW 661.6 billion.²⁷ That same month, Carlyle also sold KorAm Bank to Citigroup.²⁸ In January 2005, Newbridge sold its stake in Korea First Bank to the British bank Standard Chartered.²⁹ Newbridge realised capital gains of KRW 1.15 trillion on the sale.³⁰ The Korean media reported that both Carlyle and Newbridge had used shell companies in Malaysia to avoid Korean taxes.³¹ At about the same time, Goldman Sachs realised a KRW 24.2 billion gain in a Korean property transaction.³²
112. In February 2005, Korea's Economic Advisory Council published a report entitled *Influence of Inflows of Speculative Foreign Funds and Suggested Countermeasures*. The report estimated that speculative short-term funds (hedge funds and private equity funds) had invested USD 1.8 trillion in Korea.³³ The report goes on to highlight Carlyle's and

²⁶ Exhibit C-071, "Anti-Foreign Capital Sentiment Rages," *The Korea Times*, 24 October 2004.

²⁷ Exhibit C-636, Economic Advisory Council, Report: *Influence of Inflows of Speculative Foreign Funds and Suggested Countermeasures*, 18 February 2005, p. 4.

²⁸ Exhibit C-346, "Civic group calls for taxation of 'foreign hedge funds,'" *Yonhap News Agency*, 18 January 2005.

²⁹ Exhibit C-346, "Civic group calls for taxation of 'foreign hedge funds,'" *Yonhap News Agency*, 18 January 2005.

³⁰ Exhibit C-636, Economic Advisory Council, Report: *Influence of Inflows of Speculative Foreign Funds and Suggested Countermeasures*, 18 February 2005, p. 4.

³¹ Exhibit C-346, "Civic group calls for taxation of 'foreign hedge funds,'" *Yonhap News Agency*, 18 January 2005.

³² Exhibit C-348, "Five foreign funds taxed W215 bln for irregularities," *Yonhap News Agency*, 29 September 2005.

³³ Exhibit C-636, Economic Advisory Council, Report: *Influence of Inflows of Speculative Foreign Funds and Suggested Countermeasures*, 18 February 2005, p. 1.

Newbridge's use of Labuan, Malaysia as a tax haven. Seventeen months later, Korea's Ministry of Finance formally declared Labuan a tax haven, blacklisting it.³⁴

113. It was against this backdrop that Lone Star bought and sold the Star Tower Building in Seoul and its stake in KEB.³⁵ Both transactions were in the public spotlight, as Lone Star was now one of the most active turnaround funds in South Korea.³⁶ To the allegation of excessive profits, was added a measure of outrage that the profits had in the past been made illegally.
114. Lone Star is a private equity firm based in Dallas, Texas, that seeks assets it considers undervalued in markets inside and outside the United States.³⁷ As Lone Star's founder and Chairman, Mr. ██████████ explained, Lone Star is not a "growth" investor; rather, its business model relies on "getting a wholesale discount, then selling the assets back into the market."³⁸ However, in Korea, it says, it found its capital investment entrapped. Lone Star

³⁴ Exhibit C-663, "Korea to tax Labuan-based foreign investors," *Financial Times*, 29 June 2006.

³⁵ Exhibit C-208 / R-188, Seoul Central District Court Case No. 2006Gohap1352, Judgment, 24 November 2008 ("*Byeon Decision*"), pp. 48-50:

KEB was established in 1967, by way of BOK [Bank of Korea] contributing the full capital amount, under the Korea Exchange Bank Act which was enacted as Law No.1,800 on July 28, 1966. The Korea Exchange Bank Act provided that the capital of KEB shall be contributed by BOK, and accordingly, BOK invested a total of KRW 395 billion in KEB during a period from 1966 to 1985. Then, KEB was converted into a stock company under the Commercial Code in 1989, and Article 8(2) of the Supplementary Rules of the Korea Exchange Bank Act, which was abolished as Law No. 4,170 on December 30, 1989 stipulates "Any matter pertaining to the method and procedure of sale of company shares shall be determined by the Minister of MOFE [Ministry of Finance and Economy]."

[...]

BOK was the largest shareholder of KEB until 1998, but CB [Commerzbank AG] made a KRW 350 billion investment in KEB for a 29.79% stake around July of 1998 and then made an additional investment, raising its stake in KEB to [20.3%].

[sic]

³⁶ Exhibit C-346, "Civic group calls for taxation of 'foreign hedge funds,'" *Yonhap News Agency*, 18 January 2005.

³⁷ See Exhibit CWE-002, ██████████ First Witness Statement, para. 1; Exhibit CWE-007, ██████████ First Witness Statement, para. 1; Exhibit R-009, *Lone Star Fund IV (U.S.), L.P., Lone Star Fund IV (Bermuda), L.P. and LSF-KEB Holdings SCA v. ██████████* District of Dallas County (TX), Plaintiff's Original Petition, 16 July 2009 ("*Lone Star Petition*"), para. 2.

³⁸ Counter-Memorial, para. 91, citing Exhibit R-008, "Oregon invests heavily in ██████████ 'distressed debt' fund," *OregonLive*, 30 September 2009. See also Exhibit CWE-002, ██████████ First Witness Statement, para. 2 ("In considering potential investments, the [Lone Star] Funds' objective is to scrutinize the underlying credit quality or actual value of an asset to determine whether the asset has been undervalued by the market, and then to identify an accurate price for the investment. This type of granular analysis is the very core of our operations [...]").

was allowed to enter Korea and invest over a billion dollars in a large, ailing bank at a time (2003) when the Korean economy as a whole was in crisis, and no other investors were willing to take the risk. However, once Korea had taken full advantage of the investment, Lone Star says, it was not allowed to leave with the legitimate proceeds of that investment.³⁹

A. INVESTMENT STRUCTURE

115. As explained by the Claimants' witness, Mr. [REDACTED] Lone Star raises capital from institutional investors and high-net-worth individuals, which it pools into a series of "private equity funds" with names such as Lone Star Fund III and Lone Star Fund IV.⁴⁰ These private equity funds are organised into limited partnerships formed in Delaware (for funds contributed by U.S. investors) and Bermuda (for funds contributed by non-U.S. investors).
116. The investors are the limited partners and a management entity controlled by Lone Star is the general partner.⁴¹ The capital collected in these "upper tier" limited partnerships is then invested through various intermediate entities in jurisdictions such as Bermuda, before arriving at "the special purpose vehicle ("SPV") company [such as LSF-KEB] that [] make[s] the [foreign] investment [in this case in Korea] and become[s] the direct owner of the property or shareholding."⁴²

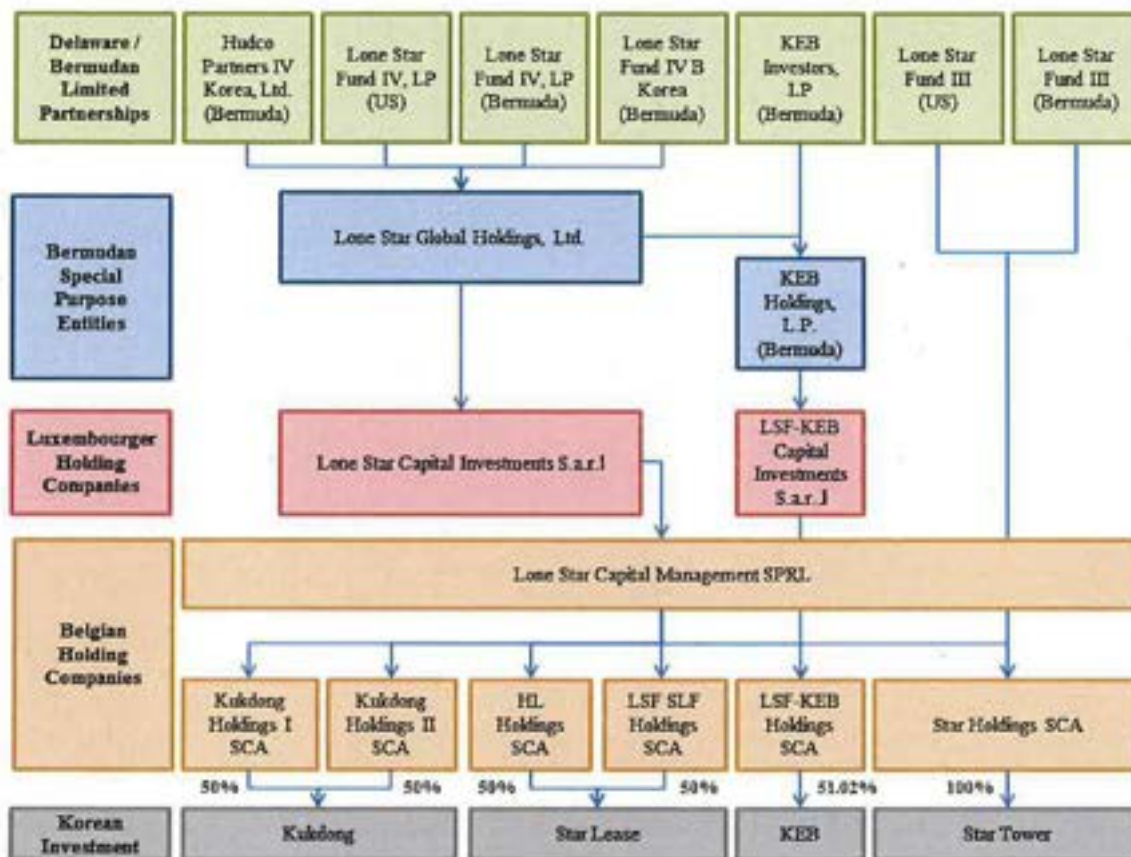
³⁹ Memorial, para. 3.

⁴⁰ Exhibit CWE-007, [REDACTED] First Witness Statement, paras. 15-16.

⁴¹ Exhibit CWE-007, [REDACTED] First Witness Statement, paras. 15-16.

⁴² Exhibit CWE-007, [REDACTED] First Witness Statement, para. 16.

Figure 1: Simplified Lone Star Corporate Holding Structure⁴³



117. As illustrated in Figure 1, six of the eight Claimants in this arbitration are Belgian holding companies that held shares in a portfolio company in Korea,⁴⁴ whereas the remaining two Claimants claim as successors in interest to one of the six Belgian holding companies (Star Holdings SCA), which was liquidated prior to the filing of Claimants' Request for Arbitration.⁴⁵

118. In 1997–1998, Korea was among the economies most severely impacted by the Asian Debt Crisis. Faced with nonperforming loans held by Korean conglomerates (*chaebol*), Korea's

⁴³ Counter-Memorial, p. 55.

⁴⁴ The six Belgian special purpose vehicle Claimants are: LSF-KEB Holdings SCA, LSF-SLF Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, and Star Holdings SCA. **Exhibit CWE-007**, [REDACTED] First Witness Statement, para. 16 and n. 2

⁴⁵ According to Lone Star, Claimants Lone Star Capital Management SPRL and Lone Star Capital Investments S.à.r.l. are successors in interest to Star Holdings SCA. See Letter of S. Alexandrov to ICSID Secretariat, 30 November 2012.

government created the Korea Asset Management Corp. ("KAMCO") to sell nonperforming loans at a discount in exchange for new capital to back interest-bearing government-backed securities.⁴⁶ Beyond the initial acquisition of this distressed debt, the first wave of foreign private equity firms to speculate in purchasing Korea's banks were Goldman Sachs, the Carlyle Group (working with J.P. Morgan), and Newbridge Capital LLC.⁴⁷ The British PE firm LaSalle also did so nearly in lockstep with Lone Star.⁴⁸

119. Foreign investors concluded that investing through Ireland,⁴⁹ Belgium, Luxembourg,⁵⁰ and

⁴⁶ Exhibit CWE-002, [REDACTED] First Witness Statement, paras. 7-8:

We turned our attention to the Korean economy when it was hit by the Asian financial crisis in late 1997 and entered into a deep recession. One of the sectors most affected by the crisis was the banking sector, which became burdened with a sharp increase in NPLs that had been made to finance business ventures by large Korean conglomerates (referred to as chaebol). To facilitate the removal of these NPLs from the books of banks and other financial institutions, the government organized the Korea Asset Management Corporation ("KAMCO") and established within it an NPL resolution fund, which would purchase the NPLs at a discount and, in exchange, inject new capital into the banks in the form of interest-bearing government-backed securities.

KAMCO actively solicited foreign investors in the distressed-debt business—including Lone Star—to buy these NPLs from KAMCO. Thus, we entered the Korean market pursuant to an invitation from the government. Initially, I dispatched one of our senior investment professionals, Mr. [REDACTED] (which, as I will explain below, we later discovered was a poor selection), to Korea to determine whether it would be an attractive investment environment for Lone Star. We fairly quickly concluded that we could build a successful investment platform there, beginning with a successful bid in KAMCO's original auction of NPLs in late 1998.

⁴⁷ Exhibit C-348, "Five foreign funds taxed W215 bln for irregularities," *Yonhap News Agency*, 29 September 2005.

⁴⁸ Exhibit R-192, Seoul Administrative Court, Case No. 2008Guhap16889, Judgment, 26 June 2009 (On 30 May 2001, LaSalle established two UK partnerships that created two Luxembourg-based and two Belgian-based entities to facilitate purchase of a Seoul office building; less than three weeks later on 18 June 2001, Lone Star closed its agreement of purchase and sale for the Star Tower building from Hyundai Development Corp.).

⁴⁹ Exhibit R-199, Memorandum from [REDACTED] to [REDACTED] and [REDACTED] 26 September 2000, p. 2:

Korea. For Korean REO transactions that can qualify under the Korea Asset-Backed Securitization ("ABS") Law and regulations (the essential requirement being that the seller of the assets qualifies as an "Originator" under the ABS Law, which includes KAMCO, banks, insurance companies, and like financial intermediaries), the acquiror/owner would be an offshore SPV with 6:1 debt capital owned through LS IrishCo (in the same manner as such investment have been made in the past). Korean REO that does not qualify under the ABS Law would likely be owned through a Korean SPV with 3:1 debt capital owned through LS Irish Co. We are continuing to explore the optimal residency of the stockholder of this SPV, so as to minimize any Korean withholding taxes on dividends or capital gains taxes on the sale of the shares.

⁵⁰ Exhibit R-192, Seoul Administrative Court, Case No. 2008Guhap16889, Judgment, 26 June 2009.

Labuan, Malaysia⁵¹ could limit or largely eliminate their Korean taxes. In 2000, Lone Star's corporate counsel, Mr. [REDACTED] outlined⁵² a Korean tax strategy for Mr. [REDACTED] Lone Star's founder and Chairman,⁵³ and Mr. [REDACTED] Lone Star's Vice Chairman and the Head of Asia Operations for Lone Star Funds (1997–2007).⁵⁴ Lone Star structured its Korean investments to reflect his tax advice.

B. LONE STAR PRINCIPALS INVOLVED IN THE CLAIMANTS' INVESTMENTS IN KOREA

120. Lone Star's investments were supervised by senior executives both Korean and expatriates.

(1) Mr. [REDACTED]

121. When Lone Star first expanded its investments into Korea in 1998, it dispatched Mr. [REDACTED] one of Lone Star's "senior investment professionals," to Korea to oversee the effort.⁵⁵ From that time until his departure (the Respondent would say "flight") from Korea in mid-September 2005, Mr. [REDACTED] was Lone Star's most senior resident executive and acted as Lone Star's "Country Manager."⁵⁶ Mr. [REDACTED] held a 27% partner participation percentage in Lone Star's Korean investments (including KEB, Kukdong, Star Lease, and others).⁵⁷ This was roughly comparable to the partner percentages held by Lone Star Chairman Mr. [REDACTED] and Senior Executive Mr. [REDACTED].⁵⁸

122. Mr. [REDACTED] identified KEB as an investment opportunity.⁵⁹ He oversaw Lone Star's due diligence in respect of KEB⁶⁰ and its success in obtaining regulatory approval of the

⁵¹ Exhibit C-346, "Civic group calls for taxation of 'foreign hedge funds,'" *Yonhap News Agency*, 18 January 2005 ("Newbridge Capital reportedly used a paper company in Labuan, a Malaysian tax haven, to avoid paying taxes.").

⁵² Exhibit R-199, Memo from [REDACTED] to [REDACTED] and [REDACTED] 26 September 2000.

⁵³ Exhibit CWE-002, [REDACTED] First Witness Statement, para. 1.

⁵⁴ Exhibit CWE-006, Witness Statement of [REDACTED] 14 October 2013 ("[REDACTED] First Witness Statement"), para. 1 ("Between 1997 and 2007, I was the Vice Chairman and the Head of Asia Operations for Lone Star Funds ("Lone Star"). In that role, I supervised Lone Star's investment activities in Asia – assisting Lone Star to identify, acquire, and manage investments there.").

⁵⁵ Exhibit CWE-002, [REDACTED] First Witness Statement, para. 8; Exhibit R-009, Lone Star Petition, para. 10; cf. Exhibit CWE-006, [REDACTED] First Witness Statement, para. 5.

⁵⁶ Exhibit R-009, Lone Star Petition, para. 10.

⁵⁷ Exhibit R-016, First Amended and Restated Limited Partnership Agreement of Lone Star Partners IV, 12 December 2001 ("Lone Star Partnership Agreement"), Exhibit E.

⁵⁸ Exhibit R-016, Lone Star Partnership Agreement.

⁵⁹ Exhibit C-208 / R-188, *Byeon* Decision.

⁶⁰ Exhibit C-208 / R-188, *Byeon* Decision, p. 64.

investments, including communications with the FSC on behalf of Lone Star.⁶¹ Mr. [REDACTED] served as a director of KEB following LSF-KEB's acquisition of control.⁶²

123. During a 2005 tax audit, it was discovered that between December 1998 and April 2005, Mr. [REDACTED] had embezzled over USD 12 million from Lone Star, using fraudulent invoices to siphon funds to himself and his family members, and engineering fictitious transactions to try to cover his tracks.⁶³ According to the Claimants, the discovery of Mr. [REDACTED] embezzlement led to the tax authorities making an improper offer "to look the other way" if Lone Star agreed to pay "substantial, illegal tax assessments" but Lone Star refused.⁶⁴

(2) Mr. [REDACTED]

124. Mr. [REDACTED] (also known by his Korean name, [REDACTED] was Lone Star's "second-in-command in Korea" under [REDACTED]. After Mr. [REDACTED] departure in mid-September 2006, [REDACTED] became Lone Star's most senior executive in Korea⁶⁵ with a 6% partner participation percentage.⁶⁶ The Korean Special Prosecution Office ("SPO") alleged that in 2003, Mr. [REDACTED] and his fellow LSF-KEB appointed directors on the KEB Board – Messrs. [REDACTED], [REDACTED] and [REDACTED] – engaged in illegal stock manipulation to bring down the stock price of KEB's credit card subsidiary (and thus KEB's cost of acquisition) (the "Stock Price Manipulation Case"). For this, Mr. [REDACTED] was tried and convicted of stock price manipulation, and ultimately sentenced to a three-

⁶¹ See Exhibit R-015, Letter from [REDACTED] to FSC, 24 September 2003.

⁶² Exhibit CWE-007, [REDACTED] First Witness Statement, para. 14.

⁶³ Exhibit CWE-002, [REDACTED] First Witness Statement, para. 23; Exhibit CWE-007, [REDACTED] First Witness Statement, para. 31.

⁶⁴ Memorial, para. 18:

[I]n the course of the tax raids and audits, Lone Star discovered that one of its employees, [REDACTED] had embezzled \$12 million from Lone Star. Lone Star reported the crime to the tax authorities, who then told Lone Star that they would look the other way if Lone Star paid substantial, illegal tax assessments. Lone Star refused. Despite the fact that Lone Star, not KEB or the Korean government, was the victim of [REDACTED] embezzlement, the episode further tainted the public's view of Lone Star.

⁶⁵ Exhibit CWE-007, [REDACTED] First Witness Statement, paras. 14, 45; Exhibit C-033 / R-139, Seoul Central District Court, Case Nos. 2007Gohap71 and 2006Gohap1272, Judgment, 1 February 2008 ("District Court Judgment, Stock Price Manipulation"), pp. 2-3.

⁶⁶ Exhibit R-016, Lone Star Partnership Agreement, p. 30.

year prison term.⁶⁷ The prosecutors also sought to proceed against Messrs. [REDACTED] and [REDACTED] but Mr. [REDACTED] had already left the country, and Messrs. [REDACTED] and [REDACTED] declined to return to Korea to address the charges.⁶⁸ Messrs. [REDACTED] and [REDACTED] of Citigroup Global Markets Korea Securities Limited ("**Citigroup**") also worked with Messrs. [REDACTED] and [REDACTED] in planning Lone Star's acquisition of KEBCS.⁶⁹

(3) Mr. [REDACTED]

125. Mr. [REDACTED] was a Lone Star appointed director of KEB⁷⁰ and the Claimants' lawyer in Korea.⁷¹ Prior to joining Lone Star, he had practiced as a tax lawyer at a major American law firm, and before that served in the U.S. Treasury Department's Office of Tax Policy.⁷² Although Mr. [REDACTED] was named in the KEB credit card case (where stock manipulation was charged), he declined to return to Korea to face charges, despite continuing to sit on KEB's Board until Lone Star's exit from Korea in 2012.⁷³

(4) Mr. [REDACTED] and Mr. [REDACTED]

126. In terms of non-resident directing minds, Mr. [REDACTED] as stated, is the founder and Chairman of Lone Star. Mr. [REDACTED] was Lone Star's global second-in-command until 2007. Mr. [REDACTED] was also implicated in the alleged KEB credit card stock manipulation⁷⁴ but declined to travel to Korea to stand trial.

⁶⁷ See generally Exhibit C-033 / R-139, District Court Judgment, Stock Price Manipulation; Exhibit C-188 / R-140, Seoul High Court, Case No. 2008No518, Judgment, 24 June 2008 ("**High Court Judgment, Stock Price Manipulation**"); Exhibit CWE-007, [REDACTED] First Witness Statement, paras. 36, 52, 59, 64.

⁶⁸ See Exhibit CWE-007, [REDACTED] First Witness Statement, para. 36 ("To this day, Mr. [REDACTED] and I cannot visit Korea without facing arrest...").

⁶⁹ Exhibit R-160, Email from [REDACTED] to [REDACTED] 21 November 2003.

⁷⁰ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 1.

⁷¹ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 1; Exhibit C-033 / R-139, District Court Judgment, Stock Price Manipulation, p. 3.

⁷² Exhibit CWE-007, [REDACTED] First Witness Statement, para. 2.

⁷³ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 36.

⁷⁴ Exhibit CWE-006, [REDACTED] First Witness Statement, para. 23 ("In the meantime, the investigations continued and in fact appeared to be escalating, with the prosecutors in October [2006] repeatedly trying, and finally succeeding, in having arrest warrants issued for me and other Lone Star personnel (in connection with the alleged KEB Card stock price manipulation).").

C. KOREAN INSTITUTIONAL PARTICIPANTS

(1) The National Assembly

127. The National Assembly is the unicameral national legislature of South Korea. Elections for the (currently) 300 seats are held every four years. Some opposition members in the National Assembly promoted a political controversy over Lone Star's investment in KEB, both when it was made in 2003 and again when Lone Star sought to sell its shares between 2005 and 2012. The opposition attacked the administration of President Roh by claiming various forms of misconduct by government officials (and Lone Star) in the 2003 acquisition and thereafter.⁷⁵ On 2 March 2006, the National Assembly demanded an audit by Korea's Bureau of Audit and Investigation ("BAI") into the events surrounding Lone Star's 2003 acquisition of KEB. The BAI launched the audit the following day. On 7 March 2006, the Finance and Economy Committee filed a criminal complaint with the SPO.⁷⁶
128. By summer 2006, President Roh's approval rating had fallen below 15% and his Uri Party had been defeated in the May 2006 local elections. In a May 2006 poll, more than three-quarters of Koreans surveyed said they believed corruption played a role in Lone Star's acquisition of KEB.⁷⁷

(2) Bureau of Audit and Inspection (BAI)

129. The BAI is a government agency charged with auditing the accounts and expenditures of the national government and reviewing the performance and operations of various government agencies.⁷⁸ After carrying out its annual audit, the BAI reports its findings to the President and the National Assembly.⁷⁹

⁷⁵ Memorial, para. 176.

⁷⁶ Memorial, para. 179.

⁷⁷ Memorial, para. 181.

⁷⁸ Exhibit C-330, Republic of Korea, *Board of Audit and Inspection Act* (Act No. 9399, January 2009) ("*BAI Act*").

⁷⁹ Exhibit C-332, Seoul Financial Forum, "Policy Recommendations for the Incoming Lee Myung-bak Government," 1 February 2008.

130. The investigation of Lone Star's acquisition of control of KEB focused on the bank's BIS ratio.⁸⁰ The BIS ratio measures a bank's portfolio risk against its total equity capital. KEB had been substantially State-owned. It was alleged that in 2003 Lone Star's lawyer, Mr. [REDACTED] bribed an official, Mr. Yang-Ho Byeon, to manipulate KEB's BIS ratio in order to facilitate Lone Star's purchase of a controlling stake in KEB. The BAI issued interim and final reports in June 2006 and March 2007, respectively,⁸¹ which were critical of Lone Star. There was particular concern over the alleged manipulation of the sale of State assets.

(3) The Financial Services / Supervisory Commission (FSC)

131. At the time LSF-KEB invested in Korea in 2003, financial policy-making was the responsibility of the Ministry of Finance, and supervision was the responsibility of the Financial Supervisory Commission.⁸² In February 2008, an amendment was made to the *Act on the Establishment of Financial Supervisory Organizations* to bring both of these functions under the responsibility of the FSC which was renamed the "Financial Services Commission" ("FSC").⁸³ Since 2008, the FSC has been responsible for matters concerning the "[s]upervision and inspection of, and sanctions against, financial institutions," "[f]inance-related policies and systems," and matters concerning "[a]uthorization and permission for the establishment, merger, conversion, acquisition and transfer of business, and management of financial institutions."⁸⁴

⁸⁰ "BIS" refers to the Bank of International Settlements, located in Basel, Switzerland.

⁸¹ **Exhibit C-152 / R-146**, BAI, Report on Sale of Korea Exchange Bank: Summary of Audit and Result, 12 March 2007 ("**BAI Report on Sale of KEB**"); **Exhibit C-134**, "Fact-Finding Audit Regarding Sale of KEB – Announcement of Interim Audit Finding," *BAI Press Release*, 19 June 2006; **Exhibit C-133**, "Supplementary Materials on the KEB Sale Progress," *BAI Press Release*, 19 June 2006.

⁸² Expert Report of Yong-Jae Kim, 21 March 2014 ("**Y.J. Kim First Expert Report**"), para. 23.

⁸³ Y.J. Kim First Expert Report, para. 24.

⁸⁴ **Exhibit RA-171**, Republic of Korea, *Act on the Establishment, Etc. of Financial Services Commission* (Law No. 11,407, partially amended 21 March 2012) ("**FSC Establishment Act**"), Art 17; see also Y.J. Kim First Expert Report, para. 24 and n. 12.

132. The FSC consists of a nine-member commission empowered to make final decisions on the adoption and implementation of financial regulatory policies supported by a large agency staff.⁸⁵
133. Korean law regulates bank ownership in excess of a particular threshold (“**excess shareholding**”).⁸⁶ A company seeking to acquire an excess shareholding exemption must obtain advance approval from the FSC.⁸⁷ In the case of Lone Star, approval was required for a shareholding in excess of 10%.
134. At issue in these proceedings is the conduct of the FSC in regulating compliance with the *Banking Act* and the *Financial Holding Companies Act* as well as its implementation of the policies established by the Ministry of Finance.⁸⁸
135. The FSC stands centre stage in the Claimants’ portrayal of Korean misconduct.

(4) FSC Chairman Mr. Seok Dong Kim

136. From 3 January 2011 to 25 February 2013, Mr. Seok Dong Kim was Chairman of the FSC. Before that time, he had been Deputy Minister of the Ministry of Finance and Economy (“**MOFE**”) between February 2007 and February 2008, and Vice Chairman of the FSC from October 2006 to January 2007. He was made Chairman of the FSC shortly after Hana’s November 2010 offer to purchase KEB, and Hana’s acquisition of KEB happened during his tenure. The Claimants’ case focuses on his role.

(5) Mr. Joo Hyung Sohn

137. Mr. Joo Hyung Sohn was the FSC Team Leader responsible for processing Hana Bank’s application to acquire KEB shares from the Claimants.

⁸⁵ Witness Statement of Hae Sun Lee, 20 March 2014 (“**H.S. Lee First Witness Statement**”), para. 4; Y.J. Kim First Expert Report, para. 25.

⁸⁶ Y.J. Kim First Expert Report, para. 44.

⁸⁷ Y.J. Kim First Expert Report, paras. 52-60.

⁸⁸ Y.J. Kim First Expert Report, paras. 23-25 and n. 13; *see also* a 2008 amendment to the *FSC Establishment Act* which merged the policy-setting and rule-making responsibilities of the Ministry of Finance with the supervision, implementation, and enforcement responsibilities of the Financial Supervisory Commission into a single agency, which became known as the “Financial Services Commission.”

(6) The Financial Supervisory Services (FSS)

138. The Financial Supervisory services (“FSS”) is the branch of the FSC which handles certain practical aspects of financial supervision, effectively serving as the enforcement arm of the FSC by conducting examination of regulated financial entities and recommending sanctions or corrective measures resulting from such examinations.⁸⁹

(7) The Fair Trade Commission (FTC)

139. Whenever the FSC’s approval is requested with respect to the acquisition of one financial institution by another, or to a financial holding company’s incorporation of a subsidiary, the potential competitive effects of the proposed transaction⁹⁰ are examined by the Fair Trade Commission (“FTC”), a quasi-judicial agency affiliated with the Prime Minister’s Office.⁹¹ In short, the FTC regulates monopolies, combines, and anti-competitive behaviour.

(8) The National Tax Service (NTS)

140. Korea’s National Tax Service (“NTS”) is headquartered in Seoul. Within the NTS, there are six Regional Tax Offices. In turn, within each Regional Tax Office there are District Tax Offices. The NTS sets up policies and plans investigations. The Regional Tax Offices implement policies and investigate. The District Tax Offices send tax notices, accept payments, and perform other daily administrative tasks.

141. The Seoul Regional Tax Office (“SRTO”) was the body within the NTS that investigated the Claimants.⁹²

⁸⁹ See, e.g., Counter-Memorial, para. 212(a).

⁹⁰ Y.J. Kim First Expert Report, para. 33.

⁹¹ Y.J. Kim First Expert Report, para. 32.

⁹² Important NTS officials (see Witness Statement of Do Gon Hwang, 19 March 2014 (“D.G. Hwang First Witness Statement”)) including:

- (i) **Mr. Do Gon Hwang** – Mr. Hwang was at relevant times the Deputy Team Leader of the SRTO’s International Transaction Investigation Team charged with investigating Lone Star. He was involved in all phases of investigating, collecting and analysing documents from the investigation’s start in August 2007 to its completion in May 2008. He participated in the raid on Lone Star’s office on 12 April 2005.
- (ii) **Mr. Myung Jun Kim** – Mr. M.J. Kim participated in the initial investigation of Lone Star in February 2003. He interviewed Lone Star’s General Counsel, Mr. [REDACTED] along with its Vice-President, Mr. [REDACTED] as part

D. HANA FINANCIAL GROUP AND HANA BANK

142. Hana Financial Group Inc. is a financial holding company organised under the laws of Korea. Its subsidiary, Hana Bank, is one of Korea's seven commercial banks. The others are Kookmin Bank, Shinhan Bank, Woori Bank, Korea Exchange Bank, Citibank Korea, and Standard Chartered Bank Korea.⁹³

(1) Hana Chairman Mr. [REDACTED]

143. Mr. [REDACTED] was the founding Chairman of Hana Financial Group, a position which he held until March 2012.⁹⁴ He started his career with Hana's predecessor, Korea Investment & Finance, in 1971, then a 26-person company. As Hana's Chairman, he played a key role in negotiating its acquisition of KEB, attending many of the important meetings and instructing those under him, namely Mr. [REDACTED] and Mr. [REDACTED].

(2) Mr. [REDACTED]

144. As of the date of his Witness Statement, Mr. [REDACTED] was Hana's Deputy President and Group Head of the Corporate Banking Group, a position he held during the negotiations for and the acquisition of KEB from Lone Star.⁹⁵ He and Mr. [REDACTED]

of the investigation. On 6 October 2005, the NTS informed the Supreme Prosecutor's Office about Lone Star's alleged violations, also advising the FSC.

- (iii) **Mr. Dong Hoon Kang** – at the time of his Witness Statement, Mr. Kang was Director at the SRTO's International Tax Investigation Division. Mr. Kang participated in the NTS's decision to deny LSF-KEB Holdings SCA's request for a refund for withholding taxes that Hana paid as a result of its KEB acquisition.
- (iv) **Mr. Ik Nam Kim and Mr. Bongho Yang** – these witnesses participated in the SRTO's periodic investigations of KEB and its partial investigation of Citibank in 2012 relating to KEB dividend payments made to LSF-KEB through Citibank between 2008 and 2012.
- (v) **Yunjun Park** – from February 2009 to June 2012, Mr. Park was the NTS's Assistant Commissioner for International Taxation. This is one of the NTS's most senior positions. In 2011–2012, Mr. [REDACTED] a Certified Public Accountant with the law firm of Kim Chang, provided reports to Mr. Park concerning Hana's acquisition of KEB shares from Lone Star. Mr. Park denies the allegation that he told Mr. [REDACTED] that the NTS's guidance letter was a written order.

⁹³ Witness Statement of Saechun Park, 16 January 2015 ("S.C Park First Witness Statement"), para. 5.

⁹⁴ Witness Statement of [REDACTED] 19 March 2014 ("[REDACTED] First Witness Statement"), para. 2.

⁹⁵ Witness Statement of [REDACTED] 19 March 2014 ("[REDACTED] First Witness Statement"), para. 1.

worked closely together on Hana's behalf. Throughout the negotiations, Mr. [REDACTED] often dealt with Mr. [REDACTED] at Lone Star.⁹⁶

(3) Mr. [REDACTED]

145. Mr. [REDACTED] was Hana's Head of the Strategic Planning Team in January 2012. He was promoted to Chief Director of the Strategic Planning Division at around the time the KEB deal closed.⁹⁷ He was responsible for communicating with Government agencies about Hana's KEB acquisition.

IV. LONE STAR'S ACQUISITION OF KOREAN ASSETS

A. LONE STAR'S INVESTMENTS IN KOREA

146. Lone Star began investing in Korea in 1998–1999, and within three years had acquired Korean assets for a total purchase price of approximately USD 2.1 billion.⁹⁸ The four investments at issue in this case are as follows.

(1) Star Tower

147. In 2001, Claimant Star Holdings SCA ("**Star Holdings**") invested KRW 100 billion (approximately USD 80 million) in Star Tower Corporation ("**Star Tower**"), a Korean company that owned a large office building in the business district of Seoul.⁹⁹ In December 2004, Star Holdings sold its shares in Star Tower Corporation to affiliates of the Government of Singapore Investment Corporation for KRW 351 billion, earning what Claimants describe as "significant capital gains" on the sale.¹⁰⁰

(2) Star Lease

148. In November 2002, Claimants LSF-SLF Holdings SCA and HL Holdings SCA (collectively "**Star Lease Holdings**") purchased a controlling interest in a company that

⁹⁶ [REDACTED] First Witness Statement, para. 3.

⁹⁷ Witness Statement of [REDACTED] 19 March 2014 ("**[REDACTED] First Witness Statement**"), paras. 2-3.

⁹⁸ Exhibit CWE-002, [REDACTED] First Witness Statement, paras. 8-9.

⁹⁹ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 7; Exhibit C-212 / RA-270, Seoul Administrative Court, Case No. 2007Guhap37650, Judgment, 16 February 2009 ("**Administrative Court Judgment, February 2009**"), p. 13.

¹⁰⁰ Memorial, para. 374; Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 2.

they renamed Star Leasing and Finance Co. ("**Star Lease**") for KRW 59 billion. Star Lease paid dividends to Star Lease Holdings totalling KRW 5.7 billion in 2006.¹⁰¹ On 9 August 2007, Star Lease Holdings sold its Star Lease shares to a Korean company for KRW 294 billion, earning what the Claimants describe as "substantial capital gains."¹⁰²

(3) Kukdong Holdings

149. Between May 2003 and December 2004, Claimants Kukdong Holdings I SCA and Kukdong Holdings II SCA (collectively "**Kukdong Holdings**") acquired a controlling shareholding in a Korean construction company, Kukdong Engineering and Construction Co., Ltd. ("**Kukdong**") for KRW 9.6 billion.¹⁰³ Kukdong paid dividends of KRW 23 billion in 2004, KRW 20 billion in 2005, and KRW 26 billion in 2006.¹⁰⁴ On 21 August 2007, the Claimants sold their interest in Kukdong to a Korean company for KRW 660 billion, earning what the Claimants describe as "substantial capital gains."¹⁰⁵

(4) Korea Exchange Bank

150. The Claimants' narrative is that in 2003 while the Korean economy was still reeling from the aftershocks of the 1997 Asian financial crisis, KEB, one of the most prestigious banks in Korea, was on the verge of insolvency. KEB needed a massive capital injection to keep it afloat. The Korean government was unwilling or unable to step in, and instead instructed the bank to look for foreign capital. Given the risks and complexity of investing such a large sum in the struggling bank at a time of great financial instability, only one entity, Lone Star, according to the Claimants, was willing to make the investment.¹⁰⁶

¹⁰¹ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 7; Exhibit C-297 / RA-231, Seoul Administrative Court, Case Nos. 2010Guhap36824 and 2012Guhap13627, Judgment, 8 February 2013 ("**Administrative Court Judgment, February 2013**"), p. 5.

¹⁰² Memorial, para. 379; Exhibit C-297 / RA-231, Administrative Court Judgment, February 2013, p. 5.

¹⁰³ Exhibit C-297, District Court Judgment, February 2013, p. 5; Exhibit CWE-007, [REDACTED] First Witness Statement, para. 7.

¹⁰⁴ Expert Report of [REDACTED] 21 March 2014 ("**[REDACTED] First Expert Report**"), para. 105; Memorial, para. 379 and n. 747.

¹⁰⁵ Memorial, para. 379; Exhibit C-297 / RA-231, Administrative Court Judgment, February 2013, p. 5.

¹⁰⁶ Memorial, para. 2.

151. Thus, on 31 October 2003, LSF-KEB acquired a 51% shareholding in KEB for KRW 1.38 trillion (USD 1.17 billion).¹⁰⁷ In May 2006, LSF-KEB exercised a call option to acquire an additional 14% of KEB's outstanding shares, for approximately USD 816 million.¹⁰⁸ In June 2007, LSF-KEB sold a block of KEB shares on the stock market for more than KRW 1.19 trillion, earning what the Claimants describe as "substantial capital gains."¹⁰⁹
152. The Claimants say that LSF-KEB did not acquire the KEB shares at a fire-sale price. LSF-KEB purchased the shares at a 55% premium over the March 2003 trading price (before the market took into account the Lone Star acquisition), and a 13% premium over the price at which KEB stock was trading immediately before the closing of the purchase.¹¹⁰
153. Subsequent efforts to sell the balance of the controlling interest in KEB shares occupy centre stage in this arbitration.
154. Over the life of the investment, LSF-KEB received more than KRW 1.7 trillion in gross dividends.¹¹¹
155. In February 2012, LSF-KEB sold its remaining interest in KEB to Hana.¹¹² The Respondent estimates that the parent entities of LSF-KEB earned a total net return on investment in excess of 171%, for an average annual return of 19.3%.¹¹³

B. ACQUISITION CONTROVERSIES

(1) Acquisition of the KEB Shares (2003)

156. Korean law required a foreign applicant to be a bank or financial holding company in its home country (the "financial institution requirement") in order to qualify as eligible for

¹⁰⁷ Memorial, paras. 91, 100.

¹⁰⁸ Memorial, para. 91.

¹⁰⁹ Memorial, para. 379; [REDACTED] First Expert Report, Table 18, n. 207.

¹¹⁰ Memorial, para. 92.

¹¹¹ [REDACTED] First Expert Report, Table 18.

¹¹² Memorial, paras. 306, 316; Counter-Memorial, para. 99.

¹¹³ [REDACTED] First Expert Report, para. 20.

shareholding in a Korean bank in excess of 10%.¹¹⁴ Typically, private equity funds structured their acquisitions using the FSC's "joint venture method," teaming with a financial institution.¹¹⁵ LSF-KEB did neither. However, the FSC was authorised to grant an exemption from this requirement, in "exceptional circumstances," such as where the target bank was insolvent and in urgent need of reorganisation (the "financial distress" exception).¹¹⁶ Lone Star sought approval for an excess shareholding exemption in KEB under the financial distress exception.¹¹⁷

157. The shares were largely acquired from a public agency, Korea Export-Import Bank ("KEXIM").¹¹⁸ The fact that a public asset was being purchased from a public agency later became of significance when allegations of corruption surfaced.
158. The regulator considered a critical measure of potential "financial distress" to be the bank's capital adequacy ratio (the "BIS ratio" referenced above in paragraph 130). The more risk a bank is exposed to, the more capital it needs to have on hand to cover risks. Assets are classified across a spectrum from no-risk to high risk. The higher the percentage of capital adequacy, the lower the risk of a bank's default and/or insolvency. As explained by the Claimants' banking expert, Mr. [REDACTED]

[T]he Korean regulator required banks to maintain a total capital ratio of 8% as an absolute minimum—a standard level that many other regulators

¹¹⁴ Exhibit CA-096 / R-143, Enforcement Decree to the *Banking Act*, Art. 5 – Annex, Table 1, Sec. 5.

¹¹⁵ Exhibit C-208 / R-188, *Byeon* Decision, p. 41:

A private equity fund is not permitted to acquire shares of a bank in excess of 10%, unless it applies to FSC for approval of excessive shareholding by teaming up with a financial business operator such as commercial banks, provided that at least 50% of such shareholding is granted to such financial business operator (such method of excessive shareholding, "Joint Venture Method"), or FSC grants an approval ("Exceptional Approval") based on the existence, with respect to the acquired bank, of a 'special reason such as resolution of a failing financial institution' as set forth in the Act on the Structural Improvement of the Financial Industry.

¹¹⁶ Exhibit R-230, Enforcement Decree to the *Banking Act* (Presidential Decree No. 17,7791, partially amended 5 December 2002), Art. 8(2). The Claimants provide a further amended version of the Decree: Exhibit C-304, Enforcement Decree to the *Banking Act* (Presidential Decree No. 22,577, partially amended 30 December 2010).

¹¹⁷ Witness Statement of Jung Hoe Kim, 20 March 2014 ("J.H. Kim First Witness Statement"), para. 17; Exhibit CWE-007, [REDACTED] First Witness Statement, para. 11; Exhibit CWE-006, [REDACTED] First Witness Statement, para. 14; Counter-Memorial, para. 122.

¹¹⁸ Exhibit C-026, Share Purchase Agreement Between Lone Star Fund IV (U.S.), L.P. and Commerzbank AG and Export-Import Bank of Korea, 27 August 2003.

*have adopted globally. If capital were to fall below this level, the regulator would be obliged to intervene. The regulator could block the payments of dividends, force the bank to raise capital, or, in extremis, oblige it to merge with another, better capitalised institution.*¹¹⁹

159. The Claimants contend that:

*A strong capital adequacy ratio is the hallmark of a healthy bank. The more equity capital a bank has at its disposal, the better protected it is against unexpected losses. Under LSF-KEB's supervision, KEB brought its capital position into compliance with the FSS's prescription for Basel II guidelines, and KEB's BIS ratio climbed to one of the highest among Korea's commercial banks.*¹²⁰

160. As of June 2003, KEB's capital adequacy ratio stood above the statutory 8% threshold, and was projected (by both KEB and the FSS) to remain above that threshold through the end of the year.¹²¹ However, there occurred a series of events, that eventually became the subject matter of a prosecution for bribery and corruption of Lone Star's local counsel, Mr. [REDACTED] and his friend, the Director of the Financial Policy Department of the Ministry of Finance, Mr. Yang-Ho Byeon.¹²² KEB management provided to the regulators revised numbers projecting that KEB's capital adequacy ratio would fall to less than 6% by the end of 2003.¹²³ This projection, which later was determined to have been inaccurate,¹²⁴ formed the basis for the regulators' decision (reached tentatively on 25 July

¹¹⁹ Exhibit CWE-013, Expert Report of [REDACTED] 15 October 2013 ("[REDACTED] First Expert Report"), para. 2.1.2.3.

¹²⁰ Memorial, para. 113.

¹²¹ Exhibit C-208 / R-188, Byeon Decision, p. 43.

¹²² Exhibit C-208 / R-188, Byeon Decision, p. 13.

¹²³ Exhibit C-208 / R-188, Byeon Decision, p. 44.

¹²⁴ Exhibit C-208 / R-188, Byeon Decision, p. 236. See Counter-Memorial, paras. 29 and 124:

The reality is that Lone Star first acquired its controlling interest in KEB at a depressed price and under suspicious circumstances, involving among other things...suspiciously low projection of KEB's capital adequacy ("BIS ratio"), designed to enable KEB to qualify for an "exceptional circumstances" exception to normal limits that exist under Korean law on the size of a single entity's shareholding in banks (the "excess shareholding" restriction), all of this amidst conduct by Lone Star and its agents in Korea that bore all the hallmarks of possible corruption;

The first set of suspicious events involved information KEB management provided the financial regulators regarding KEB's financial condition, specifically its capital adequacy ratio. As of June 2003, KEB's capital adequacy ratio stood

2003 and formally decided on 26 September 2003) to apply the financial distress exception¹²⁵ to permit Lone Star's acquisition of a controlling interest to proceed.

161. Although ultimate responsibility for determining whether to apply the financial distress exception rested with the FSC, the Ministry of Finance at that time was the body that set regulatory policy in the banking sector. The evidence is that Director Byeon played a central role in the Government's consideration of Lone Star's proposed investment in KEB.¹²⁶
162. Eventually Lone Star's lawyer [REDACTED] and Department of Finance Director Yang-Ho Byeon were prosecuted for bribery and corruption. Director Byeon was charged with several counts of wrongdoing relating to the acquisition, and served nearly 300 days in jail – before being acquitted at trial.¹²⁷ The prosecutor's appeal was ultimately dismissed by the Korean Supreme Court.
163. KEB's President and Vice-President who handled the sale were charged in the same prosecution. KEB's President, Mr. [REDACTED] ([REDACTED] was found guilty and sentenced to 18 months in prison and a fine of KRW 157,000,000. KEB's former Vice-President, Mr. [REDACTED] ([REDACTED] was acquitted. Mr. [REDACTED] Mr. [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] were not charged but appear throughout the verdict as being parties involved in the alleged misconduct.
164. [REDACTED] was Lone Star's lawyer, and was paid a USD 1 million success fee when the financial distress exemption was granted for Lone Star's acquisition of KEB Bank. The Respondent says that Lone Star officials were not indicted only because they were outside

above the statutory eight percent threshold, and was projected (by both KEB and the FSS) to remain above that threshold through the end of the year. Following communications facilitated by Mr. [REDACTED] and Director Byun, however, KEB management provided to the regulators revised numbers projecting that KEB's capital adequacy would fall dramatically to less than six percent by the end of the year. This projection, which later was determined to have been inaccurate and unreliable, formed the basis for the regulators' decision (reached tentatively on 25 July 2003 and formally decided on 26 September 2003) to apply the financial distress exception.

¹²⁵ Exhibit C-208 / R-188, *Byeon Decision*, pp. 45-46.

¹²⁶ Exhibit C-208 / R-188, *Byeon Decision*, p. 14.

¹²⁷ Exhibit C-208 / R-188, *Byeon Decision*.

Korea and refused to return to face the charges.¹²⁸ The Claimants deny any involvement in any wrongdoing either criminal or otherwise.

(2) The KEB Card Stock Manipulation Controversy

165. The widely used KEB credit card was issued by an affiliate company of KEB that was majority owned by KEB but with a substantial minority shareholding of Olympus Capital. It will be recalled that this affiliate is referred to as Korea Exchange Bank Credit Services ("KEBCS").
166. At the time Lone Star acquired control of KEB, KEBCS was in the midst of a serious liquidity shortage. External funding that in normal times served as one of its primary sources of financing (e.g., revolving loans and other short-term debt financing) had dried up in the wake of a prolonged downturn in the Korean credit card sector.¹²⁹ LG Card, another major Korean credit card, was near bankruptcy in November 2003.¹³⁰
167. Major shareholders of other Korean card companies had taken steps to reassure the market that they stood behind their credit card subsidiary, thus opening doors to a continued flow of financing.¹³¹ KEB kept silent during the period when Lone Star's investment was pending regulatory approval.¹³² This silence added to the instability.¹³³
168. In August 2003, KEB management had concluded that the liquidity shortage of KEBCS was temporary and could be managed successfully with assistance from KEB and that

¹²⁸ Messrs. [REDACTED] and [REDACTED] were not charged, but they were implicated in the prosecution with Messrs. [REDACTED] and [REDACTED] appearing throughout the verdict; see Exhibit C-208 / R-188, *Byeon* Decision.

¹²⁹ Exhibit C-057, Fax from [REDACTED] CEO of Korea Exchange Bank Card to President of Korea Exchange Bank, 15 November 2003 ("Fax from KEBCS to KEB"); Second Witness Statement of Jung Hoe Kim, 16 January 2015 ("J.H. Kim Second Witness Statement"), para. 13.

¹³⁰ Exhibit C-233 / R-151, Supreme Court Judgment, Stock Price Manipulation, p. 12 ("On November 21, 2003, the date of Announcement in this Case, and November 22, LG Card suspended its cash advance services, and the possibility of bankruptcy was posed.").

¹³¹ J.H. Kim First Witness Statement, paras. 30-31.

¹³² See Exhibit C-057, Fax from KEBCS to KEB, 15 November 2003, p. 1 (pleading with KEB to announce a future business strategy direction for KEB Card).

¹³³ Exhibit C-057, Fax from KEB Card to KEB, 15 November 2003, p. 1 (explaining that the "primary reason" KEB Card's liquidity situation was more severe than other card companies was that KEB, unlike the major shareholders of other card companies, had not adopted a credible "direction of business strategy" for KEB Card).

KEBCS was expected to return to profitability by 2005.¹³⁴ In management's view, a KEBCS default would cause immense financial and non-financial losses to KEB itself¹³⁵ and "worsen the credibility of KEB, and undermine [its] retail [business]."¹³⁶ The Claimants assert and the Respondent denies¹³⁷ that the Korean financial regulators insisted that KEB rescue KEBCS and made various threats against KEB if it did not do so.¹³⁸

169. In any event, Lone Star had concluded on the basis of its own analysis that (i) KEBCS "was deeply underwater and thus had no value,"¹³⁹ (ii) KEBCS "was very likely to fail without substantial financial support from KEB,"¹⁴⁰ and (iii) KEB "should let [KEBCS] fail rather than pour good money after bad."¹⁴¹
170. According to the Claimants, the Korean government demanded that KEB save KEBCS. Coming from its regulator, this was a directive that could only be refused at KEB's peril. Lone Star says it was shocked by the government's intervention, but eventually agreed.

¹³⁴ Exhibit R-154, Report on Korea Exchange Bank Credit Services Co., Ltd., 8 September 2003 ("KEBCS Report"), pp. 1, 4, 10-13, 19.

¹³⁵ Exhibit R-152, Testimony of [REDACTED] Seoul Central District Court, Stock Price Manipulation, 30 July 2007, (" [REDACTED] Court Testimony, 30 July 2007"), p. 24.

¹³⁶ Exhibit R-154, KEBCS Report, p. 4.

¹³⁷ Counter-Memorial, para. 149. The Respondent claims that there is "zero support for these assertions," and that the Claimants "fail to identify which government agency or official supposedly made such threats, to whom, or when."

¹³⁸ Memorial, para. 108.

¹³⁹ Exhibit CWE-002, [REDACTED] First Witness Statement, para. 20; see also Exhibit CWE-006, [REDACTED] First Witness Statement, para. 15 ("...during our pricing exercise for KEB in summer 2003, we estimated that KEB Card was approximately USD 1 billion underwater"); Exhibit CWE-007, [REDACTED] First Witness Statement, para. 20 ("It was clear to Lone Star that KEB Card was insolvent (even if its balance sheet did not yet reflect that reality) and that, as a result, KEB's 44% stake in KEB Card was worthless.").

¹⁴⁰ Exhibit CWE-006, [REDACTED] First Witness Statement, para. 15; see also Exhibit CWE-007, [REDACTED] First Witness Statement, para. 20 ("We determined, however, that KEB should not be exposed to further losses beyond the loss of its investment in KEB Card in the likely event that KEB Card defaulted.").

¹⁴¹ Exhibit CWE-006, [REDACTED] First Witness Statement, para. 15; see also Exhibit CWE-002, [REDACTED] First Witness Statement, para. 20 ("...there was no question in my mind," as of June 2003, "that KEB should let KEB Card fail when and if it could no longer survive on its own."); Memorial, para. 10. Further, according to the Claimants, "the merger antagonized the KEB Card labor union, which, fearing layoffs, protested the merger, occupied the KEB Card offices," and stormed the office of its CEO. (Of course, it is unlikely that the protesters would have accepted Lone Star's preferred strategy to let the KEB Card fail eventually!) Spec Watch, described as "an anti-foreign capital activist group," was co-founded by the former head of the KEB Card union who publicly swore that he would "get even" with Lone Star and then made it his mission over the next several years to inflame public opinion against Lone Star. Over time, the Claimants say, he was joined by other activist groups, unions, and media: Memorial, para. 11.

What this meant, according to the Claimants, was that virtually the entire amount of Lone Star's USD 1 billion investment in KEB was diverted to save KEBCS.¹⁴²

171. According to the evidence in the subsequent criminal prosecution for the stock manipulation of KEBCS shares, the Claimants planned to purchase "Olympus Capital's shares at a low price" after withholding liquidity support from KEBCS through 17 November 2003. Lone Star and KEB dubbed 17 November 2003 the "Crunch Day," *i.e.*, the day KEBCS was projected to default on its obligations absent funding support from KEB.¹⁴³ Thus, according to the Respondent, Lone Star planned a merger of KEBCS into KEB¹⁴⁴ using "the liquidity pressure on [its credit card affiliate] as a good opportunity to...[g]ain an upper hand in the negotiation with Olympus [Capital]"¹⁴⁵ for the acquisition of the minority shares.¹⁴⁶
172. In a contemporaneous email, Mr. [REDACTED] of Citigroup explained to Lone Star that: "KEB [Card] will hit a wall on Nov. 17 for roughly [KRW] 200 billion in funding needs. KEB will not commit to any assistance and therefore the stock price should go down. Thereafter, KEB will try to tender for as many shares [as possible,] and merge it into the bank. All this should happen very quickly."¹⁴⁷ This plan was dubbed "Project Squire."
173. However, when KEB management was briefed on the plan, senior officials raised concerns that the regulators might "conclude that LS [Lone Star] illegitimately blocked [liquidity]

¹⁴² Mr. [REDACTED] for example, testifies that during the week of 3 November 2003, he learned that "[t]he bank regulators insisted in no uncertain terms that KEB bail out KEB Card, and threatened to make matters very difficult for KEB going forward if KEB did not do so" (Exhibit CWE-006, [REDACTED] First Witness Statement, para. 16). Mr. [REDACTED] similarly testifies that "only a few days after Lone Star closed on its investment," he and Messrs. [REDACTED] and [REDACTED] were "told by KEB's management and [Lone Star's] advisors that, in the face of the regulators' strong pressure and insistence on a KEB rescue, letting KEB Card fail could, at worst, potentially jeopardize KEB's future and, at best, greatly complicate the operation of KEB" (Exhibit CWE-007, [REDACTED] First Witness Statement, para. 21).

¹⁴³ Exhibit R-155, Testimony of [REDACTED] Seoul Central District Court, Stock Price Manipulation, 12 December 2007 ("[REDACTED] Court Testimony"), pp. 27-28.

¹⁴⁴ Exhibit R-155, [REDACTED] Court Testimony, pp. 26-31.

¹⁴⁵ Exhibit R-154, KEBCS Report, pp. 6-8.

¹⁴⁶ Counter-Memorial, para. 145.

¹⁴⁷ Exhibit R-162, Email from [REDACTED] to Citigroup Colleagues, 9 November 2003.

support [to KEBCS] with the goal of taking over KEBCS at a cheap price” and raise an issue of “stock price manipulation.”¹⁴⁸

174. According to court testimony, Olympus Capital was advised on Thursday, 13 November 2003, that KEB would not provide liquidity support to KEBCS and was prepared to allow the company to default on its obligations on Monday, 17 November 2003¹⁴⁹ with a resulting more or less total loss to Olympus Capital of its KEBCS investment.
175. Finally, on the evening of 19 November 2003 – as KEBCS was on the cusp of default on its obligations – Olympus Capital agreed to sell its roughly 25% interest in KEBCS to KEB at KEBCS’s publicly traded stock price. By that point, the stock price had fallen significantly as a result of the unresolved liquidity crisis and widespread rumours that KEB would pursue a capital restructuring that could wipe out existing equity.¹⁵⁰
176. In the stock manipulation prosecution, the courts found that Mr. [REDACTED] of LSF-KEB had engaged in an unlawful deceptive scheme, in collusion with Lone Star’s nominees to the KEB Board, Messrs. [REDACTED] [REDACTED] and [REDACTED] to falsely announce that a capital reduction was being considered, for the purpose of causing the stock price of KEBCS to fall prior to the KEB acquisition and thereby illegally to enrich Lone Star and KEB at the expense of KEB Card’s minority shareholders.¹⁵¹ The courts also found LSF-KEB guilty of the same crime by virtue of the conduct of its high-ranking executives, including Messrs. [REDACTED] [REDACTED] [REDACTED] and [REDACTED] (the legal representative of LSF-KEB).¹⁵² Although KEB itself was initially found guilty

¹⁴⁸ Exhibit R-164, Korea Exchange Bank, Analysis of Tender Offer, 11 November 2003, p. 1.

¹⁴⁹ Exhibit R-165, Testimony of [REDACTED] Seoul District Court, Stock Price Manipulation, 20 August 2007, (“[REDACTED] Court Testimony”), pp. 144-145.

¹⁵⁰ Exhibit C-033 / R-139, District Court Judgment, Stock Price Manipulation, p. 21.

¹⁵¹ Mr. [REDACTED] LSF-KEB, and KEB were initially found guilty (Exhibit C-033 / R-139, District Court Judgment, Stock Price Manipulation). The decision was reversed on appeal (Exhibit C-188 / R-140, High Court Judgment, Stock Price Manipulation), then reversed and remanded to the Supreme Court (Exhibit C-233 / R-151, Supreme Court Judgment, Stock Price Manipulation). It was subsequently re-tried at the High Court (Exhibit C-256 / R-150, Second High, Judgment Stock Price Manipulation), where Mr. [REDACTED] and LSF-KEB were found guilty and KEB acquitted.

¹⁵² Exhibit C-033 / R-139, District Court Judgment, Stock Price Manipulation, pp. 4-6; Counter-Memorial, para. 181.

in February 2008, that finding of guilt was overturned on appeal and KEB was acquitted when the case was re-tried in September– October 2011.

177. About a year later, an ICC arbitration tribunal found Lone Star to have wrongfully caused KEBCS' other main shareholder, Olympus Capital, to sell its stake in KEB Card at an artificially depressed price and awarded Olympus USD 64 million in compensation.¹⁵³
178. The Respondent claims that, contrary to the Claimants' self-portrait of victimisation by Korean regulators, the Claimants' financial misconduct in the 2003 purchase of a controlling interest in the Korea Exchange Bank and their manipulation of KEBCS's stock price ("a serious financial crime") justified the decision of the Korean financial regulators to stall approval of the sale of KEB shares to HSBC and, subsequently, to Hana Bank and to "prepare to take appropriate measures in the exercise of their supervisory responsibilities."¹⁵⁴ However, the Claimants respond that it is far from clear what steps the FSC had in mind to take, or could have taken, or did take (if any) in the exercise of its "prudential" responsibilities to supervise Korean financial markets.
179. The Respondent alleges that from the outset, Lone Star, "by concealing its plan to allow KEB Card to fail, Lone Star misled the regulators into approving its investment in KEB under the financial distress exception."¹⁵⁵ However, the Claimants point out that there was no other investor on the horizon willing and able to invest over USD 1.7 billion in KEB in 2003.
180. According to the Respondent's Expert, Mr. ██████████ KEBCS returned to profitability in 2005, benefiting from a broader credit card industry recovery, as well as lower funding

¹⁵³ Exhibit R-147, "Morrison & Foerster International Arbitration Team Wins \$64 Million Award for Olympus Capital," *Morrison Foerster Press Release*, 23 January 2012; Exhibit R-365, *Olympus Capital KEB Cards Ltd. and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Final Award, 13 December 2011 ("*Olympus Capital*").

¹⁵⁴ Counter-Memorial, para. 142.

¹⁵⁵ Counter-Memorial, paras. 138-140.

costs and other benefits flowing from its merger with KEB.¹⁵⁶ By 2007, KEBCS was contributing approximately 20% to KEB's annual consolidated net income.¹⁵⁷

C. LONE STAR MOVES TO SELL ITS CONTROLLING INTEREST IN KEB

181. In January 2006, LSF-KEB solicited bids for its KEB shares¹⁵⁸ – which, at that time, amounted to a 64.6% stake in the bank.¹⁵⁹ The Claimants contend that they were, to some extent, the victim of circumstances. Earlier private equity investors who had also invested in Korean banks sold their stakes at a substantial profit without regulatory “harassment.” Their collective behaviour was characterised as the “Eat and Run” syndrome. The fact that some of these investors were protected by tax treaties, and therefore did not pay significant taxes in Korea on the proceeds of their sales, exacerbated public reaction. By the time Lone Star was prepared to sell, the Claimants say, Korean resentment toward private equity investors, and Lone Star in particular, had risen to a fever pitch.¹⁶⁰

(1) Potential Sale to DBS

182. Following a two-month bidding process culminating in March 2006, LSF-KEB selected Singapore-based DBS Bank (“DBS”) as its preferred purchaser.¹⁶¹

183. In November 2005, DBS had already requested a meeting with the FSC to express its interest in the KEB shares.¹⁶² DBS was concerned because its largest shareholder was a Singaporean, government-owned, private equity fund, “Temasek.”¹⁶³ The FSC could

¹⁵⁶ [REDACTED] First Expert Report, paras. 62-65.

¹⁵⁷ [REDACTED] First Expert Report, paras. 72-74; Counter-Memorial, para. 180.

¹⁵⁸ Memorial, para. 184.

¹⁵⁹ Request for Arbitration, para. 24.

¹⁶⁰ Memorial, para. 16.

¹⁶¹ Memorial, para. 184.

¹⁶² **Exhibit R-079**, Supervision Policy Department, “Examination of Whether DBS and Temasek Are the Same Person,” November 2005, p. 1-4; **Exhibit R-075**, Letter from FSS to DBS, 16 March 2006 (After looking into the issue, the regulators concluded that, based on the information then available, DBS “tentatively” could be considered an NFBO. The FSS cautioned that “whether or not DBS Bank is qualified for becoming a major shareholder of a Korean bank lies in the hands of the Financial Supervisory Commission (FSC).”).

¹⁶³ **Exhibit R-219**, Temasek Application for Excess Shareholding Approval, 13 April 2004.

classify DBS as a Non-Financial Business Organization (“NFBO”), and therefore ineligible for a major shareholding.¹⁶⁴

184. The Claimants contend that “many observers viewed the FSC’s public statements regarding the Temasek issue as a pretext for ... [its] preference for a Korean buyer for this historic and prestigious bank.”¹⁶⁵ Be that as it may, DBS withdrew its proposal in March 2006 and never actually filed an application with the FSC for acquisition of the KEB shares.

(2) Potential Sale to Kookmin Bank

185. On 19 May 2006,¹⁶⁶ LSF-KEB entered into a share purchase agreement with Kookmin Bank. Under the terms of their agreement, either party could terminate the agreement in the event that the transfer of shares was not completed and closed by 16 September 2006.¹⁶⁷

186. Kookmin submitted an application to the regulators on 23 May 2006 and over the next few months, Kookmin modified and supplemented its application on multiple occasions.¹⁶⁸ As of 16 September 2006, the date the SPA was set to expire, the parties “discovered that they no longer saw eye to eye on the terms of the sales contract.”¹⁶⁹ LSF-KEB wanted to increase the purchase price, whereas Kookmin wanted to lower it.¹⁷⁰ LSF-KEB terminated the share purchase agreement on 23 November 2006,¹⁷¹ and Kookmin withdrew its application on 27 November 2006¹⁷² thereby relieving the FSC of any obligation to make a decision.¹⁷³

¹⁶⁴ **Exhibit R-079**, Supervision Policy Department, “Examination of Whether DBS and Temasek Are the Same Person,” November 2005, p. 1.

¹⁶⁵ Memorial, para. 186.

¹⁶⁶ Memorial, para. 187; *see also* **Exhibit C-128**, Share Purchase Agreement Between LSF-KEB Holdings SCA and Kookmin Bank, 19 May 2006 (“SPA Between LSF-KEB and Kookmin”).

¹⁶⁷ **Exhibit C-128**, SPA Between LSF-KEB and Kookmin, Art. 9.1.

¹⁶⁸ **Exhibit R-082**, Supplementary Submission by Kookmin Bank to FSC, 30 May 2006; **Exhibit R-083**, Supplementary Submission by Kookmin Bank to FSC, 11 July 2006; **Exhibit R-084**, Supplementary Submission by Kookmin Bank to FSC, 27 September 2006.

¹⁶⁹ Memorial, para. 189.

¹⁷⁰ Memorial, para. 189.

¹⁷¹ **Exhibit C-149**, Notice of Termination Sent by LSF-KEB Holdings SCA to Kookmin Bank, 23 November 2006.

¹⁷² **Exhibit R-085**, Letter from Kookmin Bank to Financial Services Commission, Withdrawing Application, 27 November 2006.

¹⁷³ Counter-Memorial, para. 230.

(3) Sale of 13% of KEB Stock on the Open Market (June 2007)

187. On 22 June 2007, LSF-KEB thought it prudent to sell 13.6% of its KEB shares on the open market for USD 1.28 billion¹⁷⁴ even though that meant giving up the control premium that would have attached to those shares if LSF-KEB held them and later sold them to a strategic buyer as part of a controlling block.¹⁷⁵

(4) Potential Sale to the Hong Kong and Shanghai Banking Corporation (HSBC) (August 2007)

188. On 20 August 2007, HSBC announced that it was “in discussions about the possible acquisition of a majority stake in Korea Exchange Bank”¹⁷⁶ According to the Claimants, regulatory approval ought to have been simple and straightforward. HSBC is a major global bank. “The problem, however,” according to the Claimants, “was that the FSC did not focus on HSBC. Instead, the FSC refused to act on HSBC’s application because of Lone Star” even though, in their view, the position of the *seller* is wholly irrelevant to whether an application to acquire a bank should be approved. Issues regarding the seller, particularly if the seller is disposing of its entire stake in the bank, have nothing to do with whether the bank will thereafter be run soundly by the proposed *acquirer*. In the Claimants’ view, “[t]he FSC’s refusal to act on HSBC’s applications was, therefore, illegal and an abuse of discretion.”¹⁷⁷

189. However, controversy still surrounded Lone Star’s original 2003 acquisition. The *International Herald Tribune* reported on 23 August 2007: “The Korean Financial Supervisory Commission said Wednesday that any decision on the 4.65 trillion won, or \$4.9 billion, sale of the 51 percent stake owned by Lone Star Funds would have to wait until a legal tussle over the U.S. buyout firm’s 2003 acquisition of the bank is settled. That may take three years or more, Lone Star’s lawyers said.”¹⁷⁸

¹⁷⁴ Exhibit CWE-014, [REDACTED] First Expert Report, p. 6, Table 1.

¹⁷⁵ Exhibit CWE-006, [REDACTED] First Witness Statement, para. 25.

¹⁷⁶ Exhibit C-436, *HSBC Asia Pacific Holdings (UK) Press Release*, HSBC in Talks to Acquire Stake in Korea Exchange Bank, 20 August 2007, (“*HSBC Asia Press Release, August 2007*”).

¹⁷⁷ Memorial, para. 25.

¹⁷⁸ Exhibit R-058, “HSBC Faces 3-year wait in bid for Korean bank; Lone Star case must be resolved first,” *International Herald Tribune*, 23 August 2007, (“*HSBC Faces 3-Year Wait*”).

190. Eventually, after more than a year of delay and amidst the gathering global economic crisis, HSBC walked away from the transaction on 18 September 2008. The Claimants allege,¹⁷⁹ and the Respondent denies,¹⁸⁰ that the FSC adopted a strategy of delay to kill the HSBC transaction and eventually succeeded. The Respondent contends that Lone Star had ineptly failed to protect itself in its contractual arrangements with HSBC.

(5) Sale to Hana Bank

191. Following negotiations with a number of other prospective purchasers, LSF-KEB eventually negotiated a sale of its controlling interest to Hana. The parties entered into a Share Purchase Agreement on 25 November 2010, for a total sale price of USD 4.2 billion¹⁸¹ which was approximately 16% above the current trading value of KEB shares in the open market.¹⁸²

192. On 13 December 2010, the FSC announced the start of a review of Hana's application under the *Financial Holding Companies Act* for incorporation of KEB as a subsidiary¹⁸³ which was a regulatory process equivalent to HSBC's 2007 application "for approval of acquisition of excess shareholding" under the *Banking Act*, but is the applicable process where the proposed acquirer is a financial holding company.

193. The Hana sale was eventually approved on 27 January 2012 after a procedure characterised by the Claimants as illegal and which, in the end, forced them to accept a price reduction of USD 832.2 million. The loss equated to a net reduction of USD 433 million¹⁸⁴ after

¹⁷⁹ Memorial, Sec. III(I)(2).

¹⁸⁰ Counter-Memorial, paras. 297-303.

¹⁸¹ Exhibit C-227, SPA Between Lone Star and Hana; [REDACTED] First Witness Statement, para. 5.

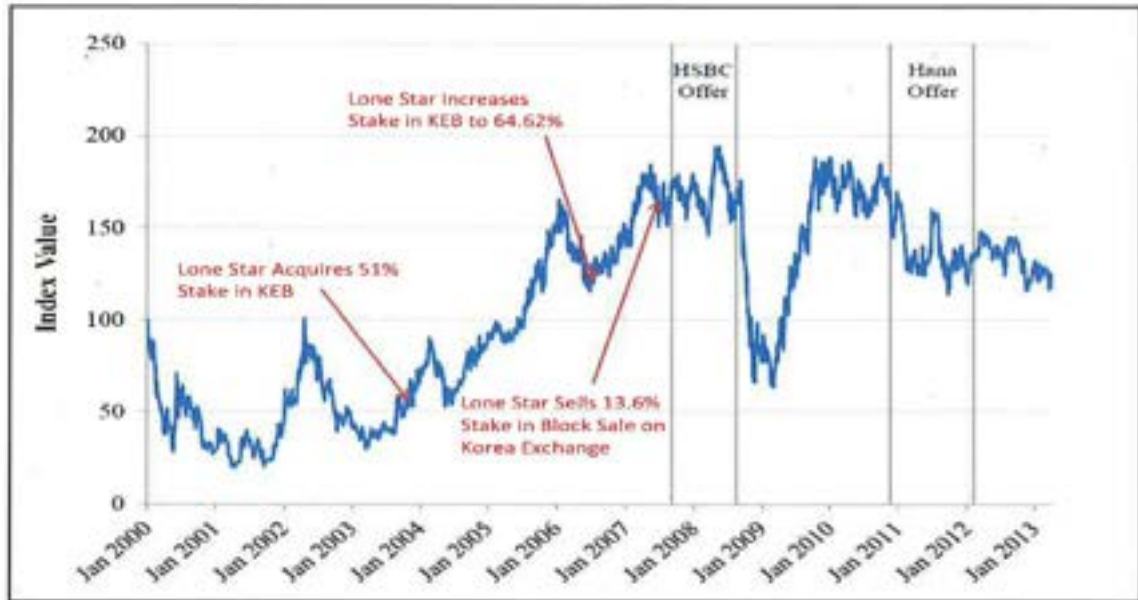
¹⁸² Exhibit C-457, "Hana Financial May Sell Debt to Finance Acquisition of Korea Exchange Bank," *Bloomberg*, 25 November 2010; Exhibit C-438, "WSJ: Lone Star Funds Agrees to Sell KEB to Hana Bank - Source," *Dow Jones News Service*, 15 November 2010.

¹⁸³ Exhibit R-097, Hana Financial Group Inc., "Application for Preliminary Approval of Incorporation of Company into a Subsidiary," 13 December 2010.

¹⁸⁴ Exhibit CWE-014, [REDACTED] First Expert Report, p. 20. Professor [REDACTED] states that the proceeds from Share Purchase Agreement that was to close on 24 May 2011 would have been USD 4,341.7 million; Professor [REDACTED] then finds that the price paid by Hana on 9 February 2012 was USD 3,509.5 million. The gross difference between these two figures is USD 832.2 million. As Professor [REDACTED] further explains, on 20 July 2011 the Claimants received a USD 400.2 million dividend; as can be seen in Professor [REDACTED] calculations, removal of this USD 400.2 million in cash already received from KEB contributed to the lower purchase price but was not attributable to the FSC. Thus,

taking into account a USD 400.2 million dividend received by Lone Star as prepayment in July 2011 and adjusting for interest.

194. The Claimants provided the Tribunal with a chart tracking KEB's publicly traded stock performance from January 2000 to 2013. It is evident that the market share price declined significantly between the failed sale to HSBC and the sale to Hana.



although the gross difference between USD 4,341.7 million and USD 3,509.5 million is USD 832.2 million, Professor [REDACTED] concludes that after the USD 400.2 million must be netted out. Thus, the Claimants damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2011.

Workpaper Hana-1
Damage Analysis
Hana Offer Case

| | Date | Interest Factor [a] | USD (Millions) [b] |
|---|-----------|---------------------|--------------------|
| [1] Hana Original Offer Price | | | 4,341.7 |
| Date of Close: May 24, 2011 | 5/24/2011 | | |
| [2] + Interest (May 24, 2011 to July 20, 2011) | | 1.0000 | 0.1 |
| [3] - After-Tax Dividend 1 | 7/20/2011 | | 400.2 |
| [4] Cumulative Loss as of July 20, 2011 | | | 3,941.6 |
| [5] + Interest (July 21, 2011 to February 9, 2012) | | 1.0001 | 0.4 |
| [6] Cumulative Loss as of February 9, 2012 | 2/9/2012 | | 3,942.0 |
| [7] - Price Paid by Hana on February 9, 2012 | | | 3,509.5 |
| [8] Cumulative Loss to Lone Star After Hana Sale | | | 432.6 |
| [9] + Interest (February 10, 2012 to September 30, 2013) | | 1.0010 | 0.4 |
| [10] Cumulative Loss on September 30, 2013 | 9/30/2013 | | 433.0 |
| [11] Add: Tax Gross-Up | | | 257.4 |
| [12] Quantum of Damages | | | 690.5 |

195. As the Claimants view the situation, the Korean authorities, having deliberately scuppered the HSBC transaction as too rich for the Korean public to tolerate, went about a strategy of squeezing Hana to reduce Lone Star's profit as much as possible, then attacking the diminished return with illegal taxation.
196. As the Respondent views the situation, Lone Star was a bad corporate actor and its troubles with the regulator and the Korean public were self-inflicted. The HSBC transaction failed because Lone Star did not protect itself contractually and permitted HSBC to slip out of the transaction when HSBC chose to do so. HSBC withdrew on the very day Lehman Brothers Bank collapsed in the United States and set off a global banking crisis.
197. As to Hana, the original purchase price was lower than the HSBC price because the share value had deteriorated, and in the end, Lone Star accepted a net price reduction of USD 433 million to close the transaction because, according to the Respondent, Lone Star accepted the deal as being in its own commercial best interest. These are matters of private contract, the Respondent says, in which regulators did not have, and were not allowed to have, involvement.

D. EVOLUTION OF LONE STAR'S REGULATORY DIFFICULTIES

198. Lone Star's regulatory problems began in earnest in 2006 when, as mentioned earlier, the National Assembly asked the Bureau of Audit and Investigation to audit the circumstances of LSF-KEB's acquisition of its controlling interest in KEB.¹⁸⁵ The BAI concluded that, "various types of wrongful and unlawful acts" were committed.¹⁸⁶ Among those implicated by the report were government officials, the KEB President, Mr. [REDACTED] and Director Yang-Ho Byeon, Morgan Stanley (the consulting firm that had served as sale manager for the 2003 transaction), and Lone Star's senior executive in Korea, Mr. [REDACTED].¹⁸⁷ The BAI alleged that KEB's financial metrics had been manipulated to enable

¹⁸⁵ Exhibit R-019, "Result of Audit and Inspection on State of KEB Sale," *BAI Press Release*, 13 March 2007, p. 1 ("BAI Press Release"); H.S. Lee First Witness Statement, para. 10; Counter-Memorial, para. 231; see also Exhibit C-152 / R-146, BAI Report on Sale of KEB.

¹⁸⁶ Exhibit R-019, BAI Press Release, p. 2.

¹⁸⁷ Exhibit R-019, BAI Press Release, pp. 2-6, 4-5, 15.

Lone Star's use of the financial distress exception that permitted acquisition of a bank by an otherwise ineligible entity.

(1) **The BAI Directed the FSC to "Take an Appropriate Action Against the Flawed Approval Dated September 26, 2003, which Authorised Lone Star's Acquisition of the KEB Shares in Excess of the Prescribed Limit"**¹⁸⁸

199. The BAI asserted that "[t]he Approval was attained illegally, as well as unjustly, based on, among others, a distorted forecast BIS ratio as of the end of 2003[.] The distorted BIS figure was derived from the overstated weakness of Korea Exchange Bank according to Lone Star's lobbying and improper requests for such overstatement."¹⁸⁹

200. The BAI found that Mr. ██████████ KEB's President, intentionally lowered KEB's asset value and asked the sale manager, Morgan Stanley, "to calculate the base negotiation price" based on such lower value.¹⁹⁰ There was evidence that "personnel from Lone Star's side including ██████████ and [outside counsel] ██████████ ██████████ etc. illegally lobbied to Director Yang-Ho [Byeon] and President ██████████ etc. to obtain exceptional approval ..."¹⁹¹ and that "[the KEB President] wrongfully receiv[ed] KRW 1.58 billion, etc. in return for resigning his presidency after cooperating with the sale of KEB."¹⁹²

201. However, in a suggestion relied upon by the Respondent to justify the FSC's "Wait and See" inaction in the coming years, the BAI Report concluded that:

We, thus, determine that the [2003] Approval can be cancelled immediately without any cost and benefit analysis.

However [...] as the criminal proceedings against ██████████ Yang-Ho [Byeon] and others are still pending, the outcome of those proceedings, including the status of their guilt or innocence, may affect whether to protect various related legal interests, and the protection of such interests may change.

Thus, we hereby determine that the Financial Supervisory Commission should reasonably decide the method and substance of resolving the flaw

¹⁸⁸ Exhibit R-019, BAI Press Release, p. 2; Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

¹⁸⁹ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

¹⁹⁰ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 3.

¹⁹¹ Exhibit R-019, BAI Press Release, p. 5.

¹⁹² Exhibit R-019, BAI Press Release, p. 2.

*in the Approval granted to Lone Star. In so doing, the Financial Supervisory Commission should comprehensively consider the progress of the aforementioned trials, the cost and benefit of canceling the Approval, the ramification of such cancellation, and the availability of other alternatives that can cure the flaw without the cancellation.*¹⁹³
[emphasis added]

202. Cancellation of the 2003 approval would mean that LSF-KEB no longer had authorisation to hold shares in excess of the statutory 10% limit and could be ordered to dispose of its KEB shares in excess of 10%.¹⁹⁴
203. From the Claimants' perspective, the mode of disposal was critical. If they could obtain approval by the FSC of a purchaser for the control block, the Claimants would benefit from a control premium. If no such approval was obtained, and the shares were sold in the open market, the control premium – which represented a significant portion of the value – would be lost.
204. The Respondent argues that “[c]onsistent with that [BAI] instruction, the FSC concluded that no such measures could immediately be taken without additional fact finding.”¹⁹⁵
205. The BAI also suggested that KEXIM, which had sold its KEB shares to LSF-KEB, might consider the possibility of a judicial action against any of the persons or entities involved in lowering KEB's share price by manipulating its financial ratio.¹⁹⁶ The Respondent states that in such an action (which was never taken) KEXIM could have sought to void the share purchase agreement by which LSF-KEB had acquired a portion of its KEB shareholding.¹⁹⁷
206. The Claimants reply that the KEXIM issue could easily have been solved by setting aside part of the sale price in escrow to await a determination of KEXIM's claim, if any, as was eventually done.

¹⁹³ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

¹⁹⁴ Y.J. Kim First Expert Report, paras. 72-73, 76.

¹⁹⁵ Counter-Memorial, para. 241. See generally H.S. Lee First Witness Statement, paras. 15-16; Exhibit R-021, Letter from Financial Services Committee to Board of Audit and Inspection, 8 May 2007, (“Letter from FSC to BAI”), paras. 3-4.

¹⁹⁶ H.S. Lee First Witness Statement, para. 14.

¹⁹⁷ H.S. Lee First Witness Statement, para. 14; Second Witness Statement of Hae Sun Lee, 15 January 2015 (“H.S. Lee Second Witness Statement”), para. 4.

(2) **The FSC's "Wait and See" Policy**

207. At the time the FSC sent its response to the BAI, there was no pending application for the sale of the KEB shares.¹⁹⁸ However, a few weeks later, on 22 June 2007, Lone Star announced that it was seeking a buyer for its approximately 51% interest in KEB.¹⁹⁹
208. In response, the FSC stated that: (1) the manner in which LSF-KEB came to own, and its continued eligibility to hold, the KEB shares would need to be addressed before the FSC could approve any application for acquisition of those shares, and (2) resolution of the ownership/eligibility issue would depend on developments in the illegal sale inquiry and the Stock Price Manipulation prosecution.²⁰⁰ Lone Star claims that what it considered to be the FSC's self-serving strategy frustrated Lone Star's effort to sell the KEB shares for the next four and a half years as follows:²⁰¹

¹⁹⁸ **Exhibit R-021**, Letter from FSC to BAI, 8 May 2007, para. 4.

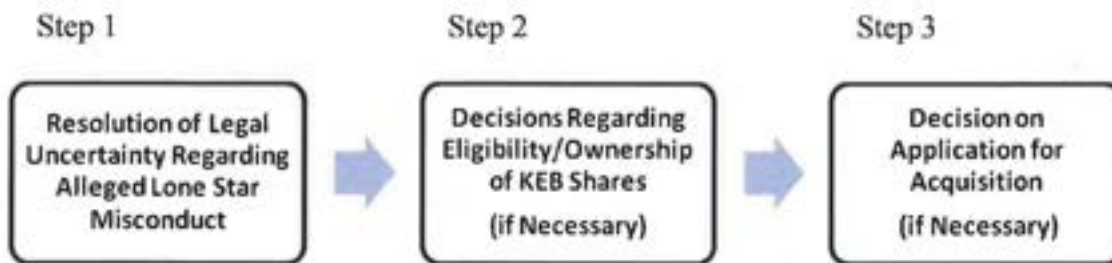
¹⁹⁹ **Exhibit C-466**, "UPDATE: Lone Star Seeks Strategic Investor for 51% Korea Exchange Bank Stake," *Dow Jones Newswires*, 22 June 2007 ("Lone Star Seeks Strategic Investor").

²⁰⁰ See **Exhibit C-156**, "Remarks by the Vice Chairman of the Financial Services Committee, Kwon Hyuk-Se, 'Financial Services Commission Putting Brakes on Lone Star's Early Sale of Korea Exchange Bank'" *Money Today*, 26 June 2007, ("FSC Chairman Remarks re: Sale of KEB") ("We are evaluating whether Lone Star was qualified to be KEB's majority shareholder," [FSC official, Mr. Kwon] said, "If Lone Star sells its shares, we will make a decision on whether to approve such sale comprehensively taking into account the majority shareholder qualification evaluation process and court's decision."); Counter-Memorial, para. 245.

²⁰¹ This figure can be found at Counter-Memorial, para. 256. See also **Exhibit C-466**, Lone Star Seeks Strategic Investor (discussing Lone Star's announcement); **Exhibit C-156**, FSC Chairman Remarks re: Sale of KEB (discussing the FSC's announcement in response). According to the Claimants, the FSC had no justification for doing what it did:

There is no authority for the proposition that the FSC can withhold approval based on extraneous factors such as public opinion or "legal uncertainties" relating to the seller. All of the considerations in the Banking Act, its Enforcement Decree, and even the Annex to the Enforcement Decree (setting out detailed requirements for the agency's approval) concern the applicant and its ability to operate a bank. The reason the Banking Act focuses on the qualifications of the applicant, i.e., the potential acquirer, is because the purpose of the Act is to protect the integrity of the financial system and the bank being acquired. The qualifications of the seller, particularly if the seller is selling its entire stake, has no bearing on that inquiry. No matter how suspect its legal status or dire its financial condition, a seller presents no risk to the solvency or integrity of the bank once it has disposed of its shares, and for this reason the characteristics of the seller are wholly irrelevant to the FSC's decision to approve an application to acquire a bank.

Memorial, para. 211.



The Claimants' position is that the sole focus of the FSC ought to have been Step 3.²⁰² In their view, Step 1 was a pretext for doing nothing and Step 2 was mischievous because, as LSF-KEB no longer wished to hold KEB shares, its eligibility to do so was of no further relevance to anybody.

209. The "Wait and See" policy is defended by the Respondent on a number of grounds.

- (a) The Respondent argues that the criminal courts are better at fact finding than is an administrative agency.²⁰³

The Claimants respond that the criminal courts have a different role and purpose than the FSC. If the FSC was serious about its own mandate, it would get on with the job of regulating and, if it wished, order LSF-KEB to dispose of its shares (for which LSF-KEB had found a series of willing and eligible buyers);

- (b) The Respondent argues that an FSC agency inquiry into the same impugned transactions might jeopardise the fair trial rights of an accused in defending a criminal prosecution.²⁰⁴

²⁰² Memorial, paras. 259-263.

²⁰³ The Respondent relies on its expert, Professor Y.J. Kim who testified that judicial agencies are considered "superior to administrative agencies in fact finding processes. The courts are better equipped to make findings about historical facts after weighing contested evidence and judging credibility." Accordingly, "if relevant facts that can affect [a] decision on sanctions are subject to the judgment of the judicial agencies, it is reasonable for the financial supervisory authorities to defer to the judiciary and decide on the appropriate sanctions depending on the outcome of the judicial proceedings." To do otherwise could be considered interference with an ongoing judicial proceeding. (Y.J. Kim First Expert Report, paras. 43 *et seq.*)

²⁰⁴ Counter-Memorial, para. 213 ("To do otherwise could be considered interference with an ongoing judicial proceeding.").

The Claimants respond that if this were a legitimate concern, it would be raised by the accused (possibly Lone Star or its officials), not the Korean State.

- (c) The Respondent argues that the FSC was responsible for the integrity of the financial markets and it was within its discretion to give priority to this “prudential” mandate over the regulatory function of approving (or not) a potential purchaser.²⁰⁵ In its view, the financial regulators have a range of responsibilities that must be discharged “holistically,” *inter alia*: monitoring the health and status of financial institutions; supervising the conduct of large shareholders and operators of financial institutions (and determining appropriate consequences for misconduct); monitoring and protecting against threats to financial system stability; and exercising approval authority, including with respect to bank ownership.²⁰⁶

The Claimants respond that, at worst, LSF-KEB would be found to be an undesirable controlling shareholder and would be ordered to sell its KEB shares in excess of 10%, which is exactly what LSF-KEB was trying to do and what the FSC’s “Wait and See” strategy was preventing.

- (d) The Respondent says that the health and status of financial institutions depends in part on the conduct of the entities that own and operate those institutions. Mismanagement or misconduct can cause serious harm to the health of a financial institution and the wider financial community and must be dealt with.²⁰⁷

The Claimants say the financial health of KEB was not in doubt at any time relevant to the multiple proposed sales of its shares.

- (e) The Respondent argues that the “Wait and See” policy was vindicated as investigations by the BAI and the Supreme Prosecutor’s Office found illegitimate

²⁰⁵ Counter-Memorial, para. 215; Y.J. Kim First Expert Report, para. 49.

²⁰⁶ Counter-Memorial, para. 246.

²⁰⁷ Counter-Memorial, para. 246.

and illegal actions in which Lone Star was involved and for which convictions were obtained.²⁰⁸

The Claimants respond, again, that if the FSC considered LSF-KEB to be an undesirable shareholder, then it should have moved quickly with its own investigation, ordered LSF-KEB to dispose of its shares and sent Lone Star and its money back to Texas.

- (f) The Respondent contends that a conviction for stock price manipulation (which qualified under the *Banking Act* as a “serious financial crime”) would disqualify LSF-KEB from continuing to hold shares in excess of the statutory limitation.²⁰⁹

The Claimants point out that conviction of a “serious financial crime” and a resulting FSC order to LSF-KEB to dispose of its controlling shares in KEB would not add to LSF-KEB’s enthusiasm to sell all of its shares as it had tried to do for five years. The mandate of the FSC was to approve the incoming purchaser, not the outgoing vendor.

- (g) The Respondent argues that the FSC was authorised to impose conditions on any sale of LSF-KEB’s “excess shareholding” were wrongdoing to be established. Thus:

*[W]hen an excess shareholder is punished for violation of a finance-related crime, the regulatory penalty is loss of eligibility for excess shareholding, and the shareholder can be ordered to dispose of its shares in excess of the statutory threshold. If disposition is ordered, the regulators are entitled to impose conditions upon the sale.*²¹⁰ [emphasis added]

The Claimants consider that it is not clear what “conditions” the FSC would be entitled to impose “on the sale” in these circumstances. In their view, such

²⁰⁸ Counter-Memorial, para. 249.

²⁰⁹ Counter-Memorial, para. 250. The Respondent states that the investigation conducted by the SPO revealed that four of Lone Star’s representatives on the KEB Board of Directors had been involved in illegal manipulation of the KEB Card stock price, LSF-KEB, KEB, and the one implicated Lone Star officer who was resident in Korea at the time, were indicted and prosecuted for criminal stock price manipulation.

²¹⁰ Counter-Memorial, para. 264 citing Y.J. Kim First Expert Report, paras. 75-76, 102-104.

conditions could not include punishment, as punishment was the prerogative of the criminal courts. Nor in the Claimants' submission was the FSC authorised to order an open market sale so as to deny the Claimants the value of their control premium, as was demonstrated by the conduct of the FSC subsequent to LSF-KEB's conviction in issuing the Disposition Order without any such conditions demonstrated.

- (h) The Respondent states that if KEXIM sought and achieved nullification of the share purchase agreement that had been used to transfer 80 million KEB shares from KEXIM to Lone Star in 2003, it would affect Lone Star's ownership of, or ability to sell, the KEB shares, which in turn would complicate, or possibly render moot, any future application by HSBC or Hana Bank to acquire those shares.²¹¹

The Claimants note that there is no evidence that KEXIM contemplated any such action and if it had done so, it would (like Olympus Capital) have sought compensation, not a return of the shares, or sought an order to set aside funds from Lone Star's sale of KEB shares to be held in escrow sufficient to satisfy any KEXIM claim.

- (i) The Respondent says that premature approval of a sale of the shares would have prevented the FSC from imposing "necessary sanctions for disruption of the financial order in the event that Lone Star were convicted of stock price manipulation."²¹² Such sanctions, the Respondent says, play an important role in the financial regulators' supervision of the banking sector, by deterring bad conduct and reducing moral hazard.²¹³

The Claimants note that the FSC has never identified any such "necessary sanctions" within its power to impose except to order a disposition of the KEB shares which is exactly what LSF-KEB wanted.

²¹¹ Counter-Memorial, para. 252.

²¹² Counter Memorial, para. 253; H.S. Lee First Witness Statement, para. 27.

²¹³ Y.J. Kim First Expert Report, para. 85; Witness Statement of Dai-Gou Sung, 20 March 2014 ("D.G. Sung First Witness Statement"), para. 8.

210. By way of general response, the Claimants say that the FSC's reliance on "legal uncertainty" was merely "a pretext designed to obscure the fact that the regulators were basing their decisions on political rather than legal concerns."²¹⁴
211. In the Claimants' view, further evidence of the Respondent's bad faith approach is the belated revival of the issue of Lone Star's NFBO status. When LSF-KEB submitted its 2003 application for approval of acquisition of the KEB shares, the NFBO issue was resolved in Lone Star's favour. Four years later, when the plan of LSF-KEB to divest its controlling interest in the bank became controversial, the BAI instructed the FSC to conduct its own examination of LSF-KEB's overseas affiliates. Lone Star says there was no basis for such an instruction, and indeed, after a certain amount of skirmishing, the FSC and FSS decided (again) not to pursue the NFBO issue.²¹⁵
212. The Respondent points out that there is no evidence that the NFBO issue delayed the FSC's review or approval of either the HSBC application in 2007–2008 or the Hana applications in 2011–2012.²¹⁶
- (3) **The Claimants Contend that the FSC's "Wait and See" Policy Violated Mandatory Statutory Deadlines to Process the Applications for Approval**
213. The Claimants argue that the FSC was obliged by statute to decide approval applications within 30 days, *e.g.*, the HSBC application should have been approved, they say, by the middle of January 2008 or mid-February at the latest.²¹⁷ The Respondent's experts, Professors [REDACTED] and [REDACTED] state that "**as long as there are no special circumstances such as, *inter alia*, the abuse of authority for wrongful purposes, an administrative action by an administrative agency cannot be deemed to be unlawful simply because the review period was delayed**"²¹⁸ [emphasis added].

²¹⁴ Memorial, paras. 260-261.

²¹⁵ Memorial, para. 299; Reply, paras. 152 *et seq.*

²¹⁶ Counter-Memorial paras. 389-390; referring to H.S. Lee First Witness Statement, para. 52; **Exhibit R-113**, Minutes of 27 January 2012 FSC Meeting.

²¹⁷ Memorial, para. 256.

²¹⁸ Expert Report of [REDACTED] and [REDACTED] 20 March 2014 ("[REDACTED] First Expert Report"), para. 35.

214. The Respondent argues that the processing period was tolled for various reasons from time to time, including waiting for receipt from the various applicants of requested information. Properly excluding these time periods during which processing of the application was tolled according to applicable procedures, the appropriate regulatory processing period was never exceeded.²¹⁹

(4) LSF-KEB Encounters “Wait and See” Problems in Selling its Majority Stake in KEB to HSBC: September 2007

215. While the Tribunal concludes²²⁰ that the claims in respect of the HSBC are not in themselves within the Tribunal’s jurisdiction, the processing history of the HSBC claim may nevertheless be probative of a pattern of FSC behaviour that reinforces the Claimants’ allegations of FSC malfeasance in respect of the Hana transaction which *is* within the Tribunal’s jurisdiction.

216. HSBC and LSF-KEB entered into a Share Purchase Agreement on 3 September 2007.²²¹

217. The same day, the FSC announced its “Wait and See” policy as follows:

*A trial is going on regarding the KEB sale and manipulation of share prices of Korea Exchange Credit Bank Service. FSC cannot review the approval for HSBC’s acquisition of KEB until legal uncertainties relating to the trial are resolved.*²²² [emphasis added]

This pronouncement constituted a departure from the FSC’s earlier position expressed by the then FSC Chairman Jeung-hyun Yoon in February 2006:

[T]here are no legal grounds to stop the sales process. In addition, the government authorities can neither force nor advise a majority shareholder of KEB to adjust the timeline for selling its shares.

[...] if the Korean government, politicians or relevant authorities took that kind of action against a foreign majority shareholder, Korea might be

²¹⁹ Y.J. Kim First Expert Report, paras. 70-76, 78; [REDACTED] First Expert Report, paras. 41-49; H.S. Lee First Witness Statement, para. 45.

²²⁰ See below at paragraph 291.

²²¹ Exhibit C-162, SPA Between LSF-KEB and HSBC.

²²² Exhibit C-161, “Financial Services Commission Cannot Approve the Sale of Korea Exchange Bank Until the Court Decisions Are Out” *Yonhap News Agency*, 3 September 2007.

*seriously misunderstood and become a laughing stock in the global market.*²²³

218. Similar statements were made by Deputy Finance Minister Kim Seok-dong and Deputy Prime Minister and MOFE Minister Deok-Soo Han.²²⁴
219. The Claimants contend that the “Wait and See” policy was a pretext to appease hostile public opinion:

*The FSC changed its position on the KEB acquisition a half dozen times during the nine-month period in which the HSBC transaction was pending, with most of the shifts prompted by political developments unrelated to the KEB acquisition (much less HSBC’s qualifications as a major shareholder).*²²⁵

220. There was never any doubt about the potential value of an investment by global giant HSBC to the development of Korea’s financial sector.²²⁶ The incoming FSC Chairman, Dr. Kwang-Woo Jun, testified that:

*With respect to the Lone Star issue, this simply meant that when a sufficient degree of resolution of legal uncertainty had been achieved, and it was time to move forward with review of HSBC’s application, it would be important to build consensus among various stakeholders and to educate the public regarding the benefits of the HSBC transaction. [...] In this way, we could avoid unnecessarily inflaming opposition to our policy decisions.*²²⁷ [emphasis added]

²²³ Exhibit C-104, Minutes of State Affairs Committee 16 February 2006 Meeting, Statement by FSC Chairman Jeung-hyun Yoon.

²²⁴ Exhibit C-474, “No grounds to stop KEB sale: official,” *The Korea Herald*, 21 February 2006 (Statement made by Deputy Finance Minister Kim Seok-dong: “We [the Government] don’t see any legal grounds to suspend the sale process. The matter is entirely up to Lone Star.”); Exhibit C-126, “Deputy Prime Minister Deok-Soo Han, ‘It is unreasonable to postpone KEB sale,’” *Money Today*, 23 February 2006 (Statement made by Deputy Prime Minister and MOFE Minister Deok-Soo Han: “It does not make sense by global standards that Lone Star’s sale of KEB should be postponed because Lone Star is expected to earn KRW 3 trillion from such sale.”).

²²⁵ Memorial, para. 261; see also para. 227 (“The period that elapsed between the SPA’s execution and termination was marked by sharp and erratic changes in the FSC’s posture, with the prospects for regulators’ approval seeming to fluctuate by the month.”).

²²⁶ Witness Statement of Kwang-Woo Jun, 19 March 2014 (“K.W. Jun First Witness Statement”) paras. 12, 19, 21; H.S. Lee First Witness Statement, para. 30.

²²⁷ K.W. Jun First Witness Statement, para. 21.

221. On 1 February 2008, the Seoul Central District Court found Mr. [REDACTED] LSF-KEB, and KEB guilty of stock price manipulation. The FSC deferred any action on the HSBC approval pending appeal.²²⁸
222. In late April 2008, Lone Star and HSBC agreed to extend the closing of the HSBC SPA through 31 July 2008.²²⁹ Absent a further extension, both parties would be free after that date to terminate the agreement, without penalty. As will be seen, no further extension was agreed to and the transaction failed.
223. On 24 April 2008, FSC Chairman Kwang-Woo Jun stated that “we will seek to find a way to resolve the issue as soon as possible in light of our plan to develop Korea into a hub of industry and finance.”²³⁰
224. On 24 June 2008, the Seoul High Court reversed the guilty verdict in the Stock Price Manipulation Case²³¹ thus removing, at least for the time being, one of the two sources of what the FSC called the legal uncertainty.²³²
225. However, on 25 June 2008, the FSC’s “Wait and See” policy reappeared as FSC Chairman Jun stated:
- [I]t is inappropriate to go ahead with the overall sale processes of KEB while the legal proceedings were still ongoing.*²³³
226. On 9 July 2008, Lone Star Chairman [REDACTED] sent a letter to FSC Chairman Jun, stating that unless the FSC approved HSBC’s application, LSF-KEB would dump the KEB shares on the open stock market (thereby sacrificing the control premium) and thereafter initiate international arbitration against Korea to collect its losses.²³⁴

²²⁸ Counter-Memorial, para. 263.

²²⁹ Exhibit C-184, Amended SPA Between LSF-KEB and HSBC, p. 1.

²³⁰ Exhibit C-183, “KEB sell-off needs to accelerate: FSC Chairman,” *Financial News*, 24 April 2008.

²³¹ Exhibit C-188 / R-140, High Court Judgment, Stock Price Manipulation.

²³² K.W. Jun First Witness Statement, para. 24; H.S. Lee First Witness Statement, para. 32.

²³³ Exhibit C-192, “Withdrawal of Chairman of the FSC Kwang-Woo Jun’s original position,” *Asia Economy*, 25 June 2008.

²³⁴ Exhibit R-099, Letter from [REDACTED] to K.W. Jun, 9 July 2008, pp. 3-4; see also K.W. Jun First Witness Statement, para. 25.

withdrew from the HSBC SPA, citing the recent further deterioration in global economic conditions.²³⁹

230. The Respondent denies any responsibility for the resulting financial loss to Lone Star. In its view, Lone Star's refusal to accept HSBC's offer of an extension of the commitment period was the cause of its downfall.
231. The failure of the HSBC purchase ended with a further denunciation of Korean authorities dated 11 February 2009 from Lone Star Chairman, Mr. [REDACTED] to the FSC Chairman, again outlining LSF-KEB's case for an investment treaty arbitration.²⁴⁰

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- *Lone Star has indicated it needs evidence satisfactory to Lone Star to do this. It is HSBC's belief that we would need wording along the lines of the following to satisfy Lone Star's continuing concerns:*
"The FSC will review HSBC's application and reach a conclusion within 30 days of receipt of HSBC's updated application."

(Exhibit R-074, Email from [REDACTED] to [REDACTED] et al., 1 August 2008 [bold emphasis added; underlined emphasis in original]).

²³⁹ Exhibit R-044, "Agreement for proposed acquisition of a 51% shareholding in Korea Exchange Bank terminated," HSBC Press Release, 18 September 2008; Counter-Memorial, para. 295.

²⁴⁰ Exhibit C-367, Letter from [REDACTED] to D.S. Chin, 11 February 2009:

[...] [F]or more than three years now, Lone Star has attempted to sell its stake in KEB [...]. But at each turn, its efforts have been thwarted by the Korean government.

First, in early 2006, Lone Star agreed to sell its stake in KEB to Kookmin Bank. But after a several-month stalemate with the Korean government over its approval of Kookmin Bank, Lone Star was forced to terminate that sale. It then tried to sell KEB to DBS Bank of Singapore in early 2007, but the Korean government also refused to approve DBS. Finally, in September 2007, Lone Star reached an agreement to sell the majority interest in KEB to HSBC, for approximately USD 6.2 billion. But after continued delays and inaction by the Korean government lasting more than a full year, HSBC finally gave up and cancelled the purchase.

[...]

The Korean government now appears ready to approve a new owner of KEB. But after having had three deals spurned and with the current global financial turmoil, it is highly improbable that any buyer for KEB at anywhere near the HSBC price will surface. [...]

We have been advised by our Korean and international legal counsel that the Korean Financial Services Commission's refusal to approve HSBC's application to become the majority shareholder of KEB was in clear violation of Korean and international law. In that regard, Korea has entered into a number of treaties that protect foreign investors, like Lone Star, with respect to their investments in Korea, including the right to bring an arbitration claim before the International Centre for Settlement of Investment Disputes ("ICSID"), a

232. However, as in the case of previous Lone Star denunciations dated 9 July 2008²⁴¹ and 8 August 2008,²⁴² no arbitration was initiated.

(5) LSF-KEB Encounters Similar “Wait and See” Problems in Selling its Majority Stake in KEB to Hana Financial Group: November 2010

233. On 25 November 2010, Hana agreed to purchase LSF-KEB’s stake in KEB at a price approximately 16% above the stock’s then-current trading value²⁴³ for a total sale price of USD 4.2 billion.²⁴⁴ An application was made to the FSC for approval in December 2010.

234. The Respondent’s version of events – which is not contested by the Claimants – is that the regulators made progress in the three months following Hana’s December 2010 submission²⁴⁵ and were preparing to put the application on the Commission’s agenda for an upcoming meeting on 16 March 2011.

235. However, on 10 March 2011, six days before the date on which the Respondent says the FSC was expected to take up Hana’s application as an agenda item,²⁴⁶ the Supreme Court vacated the June 2008 acquittal of LSF-KEB, KEB, and Mr. [REDACTED] in the Stock Price Manipulation Case and remanded the case for further proceedings.²⁴⁷ This development

member of the World Bank Group, if they have been unfairly treated. Lone Star has been advised by its legal counsel that it has a valid claim against the Korean government under the applicable investment treaty for the loss that its investors have suffered; moreover this claim is ripe and could be pursued at any time.
[emphasis added]

²⁴¹ Exhibit R-099, Letter from [REDACTED] to K.W. Jun, 9 July 2008.

²⁴² Exhibit R-001, Letter from [REDACTED] to K.W. Jun, 8 August 2008.

²⁴³ Exhibit C-457, “Hana Financial May Sell Debt to Finance Acquisition of Korea Exchange Bank,” *Bloomberg*, 25 November 2010; Exhibit C-438, “WSJ: Lone Star Funds Agrees to Sell KEB to Hana Bank - Source,” *Dow Jones News Service*, 15 November 2010.

²⁴⁴ Exhibit C-227, SPA Between Lone Star and Hana; [REDACTED] First Witness Statement, para. 5.

²⁴⁵ Second Witness Statement of Joo Hyung Sohn, 15 January 2015 (“J.H. Sohn Second Witness Statement”), para. 6.

²⁴⁶ Counter-Memorial, para. 315.

²⁴⁷ Exhibit C-233 / 151, Supreme Court Judgment, Stock Price Manipulation; see also D.G. Sung First Witness Statement, para. 14 (describing the surprising nature of this decision).

was seen by the FSC as justification to further “Wait and See” the outcome of the “further proceedings” before taking any decision on Hana’s acquisition application.²⁴⁸

236. On 16 March 2011, the FSC formally announced that it was necessary to resolve the integrity issues concerning the *vendor* to entitle LSF-KEB to retain its USD 4.2 billion KEB stake²⁴⁹ which LSF-KEB wished to convey to Hana.
237. On 18 May 2011, in an effort to reassure the financial markets, a plan was announced whereby Hana Financial Group and Hana Bank each would acquire a five percent shareholding in KEB from LSF-KEB at the same price per share as agreed under the Hana SPA.²⁵⁰ This was intended to signal affirmation that Hana would be the ultimate purchaser of KEB²⁵¹ and render LSF-KEB’s remaining interest in KEB less than a majority shareholding (*i.e.*, 41.02%), thereby frustrating other potential buyers who might otherwise have approached LSF-KEB to seek majority control of KEB.²⁵² The proposed interim purchase of 10% would not require regulatory approval. There was to be an associated loan from Hana to LSF-KEB secured on the remaining KEB shares. The interim share purchase did not proceed.²⁵³
238. On 8 July 2011, Hana and LSF-KEB amended and extended the SPA for another six months.²⁵⁴ The sale price per share was reduced in part to account for the fact that KEB’s value had declined since the SPA was last amended on 9 December 2010.²⁵⁵

²⁴⁸ See Sections IV.D(2) and IV.D(4) above (describing the FSC’s prior use and articulation of this approach); *see also* D.G. Sung First Witness Statement, paras. 14-15 (describing the FSC’s use of the approach following the March 2011 Supreme Court decision).

²⁴⁹ **Exhibit C-236**, “Results of the Evaluation of the Qualification of KEB as Shareholder Holding Shares in Excess of Prescribed Limit,” *FSC Press Release*, 16 March 2011, p. 2.

²⁵⁰ [REDACTED] First Witness Statement, para. 6.

²⁵¹ [REDACTED] First Witness Statement, para. 6.

²⁵² [REDACTED] First Witness Statement, para. 8.

²⁵³ [REDACTED] First Witness Statement, para. 7; [REDACTED] First Witness Statement, para. 14. While a minority block of shares ordinarily would sell at a discount to the stock market price, Hana was planning to buy the KEB shares at a 60 percent premium to the then-market price, which could expose Hana to significant losses. The FSC expressed a concern about a risk to Hana’s soundness.

²⁵⁴ **Exhibit C-250**, Second Amendment to the Share Purchase Agreement Between Lone Star and Hana Financial Group, 8 July 2011 (“**Second Amendment to SPA Between Lone Star and Hana**”).

²⁵⁵ [REDACTED] First Witness Statement, para. 17.

239. On 6 October 2011, the Seoul High Court entered convictions in the Stock Price Manipulation Case, finding that the “Defendant [REDACTED] [REDACTED] in conspiracy with [REDACTED] [REDACTED] and [REDACTED] intentionally used deception for the purpose of gaining unjust profit in relation to the trade of securities and other transaction[s] which resulted in Defendants KEB and LSF-KEB’s profit of 5 billion won” [emphasis added].²⁵⁶ Mr. [REDACTED] was sentenced to three years in jail and LSF-KEB was fined KRW 25 billion.²⁵⁷ The Court found that by 28 November 2003 at the latest, KEB had realised KRW 12,375,770,000 in profit, while LSF-KEB had similarly realised a profit of KRW 10,002,500,000 by that time.²⁵⁸ KEB itself was acquitted.
240. A week later, on 12 October 2011, Lone Star informed the FSC that “LSF-KEB Holdings SCA has decided that it [would] not appeal the decision rendered against it by the Seoul High Court on October 6, 2011.”²⁵⁹ Lone Star had previously threatened a constitutional challenge to any verdict based on vicarious liability for the acts of its employees. The foundation for such an argument disappeared when prosecutors amended the indictment before trial to remove the vicarious liability element to the charges.²⁶⁰ The argument was

²⁵⁶ Exhibit C-256, Seoul High Court Judgment, Case No. 2011No806, 6 October 2011 (“High Court Judgment, October 2011”), p. 35.

²⁵⁷ Exhibit C-256, High Court Judgment, October 2011, p. 3.

²⁵⁸ Exhibit C-256, High Court Judgment, October 2011, pp. 27-28.

²⁵⁹ Exhibit C-257, Letter from [REDACTED] to S.D. Kim, 12 October 2011.

²⁶⁰ Exhibit C-256, Seoul High Court Judgement, Case No. 2011No806, p. 7, n. 1 and p. 44, n. 14:

In connection with the application of the dual liability provision under the SEA to Defendant LSF-KEB, the legal counsel gives one of the grounds for appeal that Defendant [REDACTED] [REDACTED] [REDACTED] and [REDACTED] are not the agent or employee of Defendant LSF-KEB, which, however, is not subject to the High Court decision any longer due to the amendment to the indictment in the High Court trial.

Originally, Prosecutors indicted that [REDACTED] [REDACTED] and [REDACTED] [REDACTED] and [REDACTED] [sic], as registered directors of Defendant KEB, violated the former SEA under this case in connection with Defendant KEB’s business at their position as representative, user or other staff of Defendant KEB. Then, with respect to the joint penal provisions prescribed in Article 215 of the former SEA, Prosecutors reflected the previous unconstitutional ruling by Constitutional Court. (Constitutional Court Decision No. 2010HeonGa66 rendered on April 20, 2011) which ruled that punishing the representative, user or other staff of a corporate [sic] just because of their violation of Article 208 of the former SEA was against the principle of liability under the Constitution. After being rendered, Prosecutors applied High Court for the change in the indictment

further undermined by the conviction of one of its top executives, Mr. [REDACTED] on the charge of conspiring with LSF-KEB's three most senior people in Korea (the "directing minds" of LSF-KEB), which suggested direct liability, not vicarious liability. The Claimants announced that the waiver of an appeal would end any "legal uncertainty" justification for continued FSC inaction.

(6) **The FSC Orders LSF-KEB to Sell its Controlling Interest in KEB**

241. In light of LSF-KEB's conviction, the FSC proceeded to deal with LSF-KEB's status as an excess shareholder.

- (a) The first step, on 17 October 2011, involved FSC issuing an Advance Notice of Disposition²⁶¹ notifying LSF-KEB of its non-compliance with the eligibility requirement of the *Banking Act* and providing it "an opportunity to cure the eligibility defect."

Of course, there was nothing LSF-KEB could do about its conviction for "serious economic crime" but the Respondent says the FSC was required by law to extend the invitation.²⁶²

- (b) On 25 October 2011, the FSC issued a **Compliance Order** to Lone Star pursuant to Article 16-4(4) of the *Banking Act*, prohibiting LSF-KEB from exercising its voting rights in excess of 10% of KEB shares.²⁶³
- (c) On 31 October 2011, the FSC informed Lone Star of its intention to issue a Disposition Order requiring Lone Star to dispose of its shares in excess of the 10%

which focused on Defendants [REDACTED] [REDACTED] etc. violated the SEA[] under this case as actual representatives of Defendant KEB and it was approved by High Court. Therefore whether Defendants [REDACTED] [REDACTED] etc. are representative, user or other staff of Defendant KEB or not is not a subject matter for review to High Court anymore.

²⁶¹ Exhibit R-102, FSC, Advance Notice of Disposition, 17 October 2011.

²⁶² Counter-Memorial, para. 329; Exhibit CA-098, *Banking Act*, Art. 16-4(3); see also Y.J. Kim First Expert Report, paras. 95-97; D.G. Sung First Witness Statement, para. 18.

²⁶³ Exhibit C-261, FSC, Compliance Order to Satisfy the Qualifications to Hold Shares in Excess of the Prescribed Limits, 25 October 2011 ("Compliance Order"), p. 2. As the header of the Compliance Order makes clear, the term "Lone Star Fund IV" previously had been defined to include "Lone Star Partners IV, L.P., Lone Star Fund IV (U.S.), L.P. and LSF-KEB Holdings SCA".

statutory threshold.²⁶⁴ The Claimants note that such a disposition order was “a mere formality, in that the Order [was] not necessary to cause LSF-KEB to dispose of its shares in KEB” because LSF-KEB wanted nothing more than to dispose of its KEB shares.²⁶⁵ Thus, according to Lone Star, the FSC’s refusal to approve Hana’s application wrongfully put Lone Star in an impossible situation.²⁶⁶ It was ordered to sell and it wanted to sell but without a decision from the FSC, Lone Star had no approved buyer for its 51% control block and thus no way of realizing the profits from a control premium.

242. On 18 November 2011, the FSC issued the **Disposition Order**²⁶⁷ allowing Lone Star the maximum period of six months permitted by the *Banking Act* in which to dispose of its shares.²⁶⁸ The notice did not acknowledge the fact that Lone Star had a willing buyer awaiting approval. According to the Claimants, disposition was ordered “so that the Korean public could be satisfied that the FSC was sufficiently ‘punishing’ Lone Star for its alleged misconduct.”²⁶⁹
243. In addition to the Compliance and Disposition Orders, the FSC also issued various regulatory measures against the members of the KEB Board of Directors implicated in the Stock Price Manipulation Case.²⁷⁰

²⁶⁴ Exhibit C-265, FSC, Preliminary Notice of Contemplated Measure, 31 October 2011.

²⁶⁵ Exhibit C-266, Letter from LSF-KEB to FSC, 1 November 2011, para. 3.

²⁶⁶ Memorial, para. 30.

²⁶⁷ Exhibit C-276, Disposition Order.

²⁶⁸ Exhibit C-276, Disposition Order; D.G. Sung First Witness Statement, para. 23.

²⁶⁹ Memorial, para. 589. The Respondent relies upon its expert, Professor Y.J. Kim, who testified that disposition orders serve an important deterrent purpose; were it possible in all cases for a major shareholder to avoid sanctions simply by consummating a private change of control transaction, the FSC could face serious difficulty in attempting to enforce the eligibility assessment system (Y.J. Kim First Expert Report, para. 85). However, in the end, the scenario that concerned Professor Kim is exactly the outcome in the case sanctioned by the FSC.

²⁷⁰ Exhibit C-279, FSS, Prior Notice of Contemplated Measures of Examination Results (Officers and Employees of Korea Exchange Bank), 28 November 2011. The Seoul High Court had concluded that in addition to Mr. [REDACTED] other high ranking Lone Star executives on the KEB Board were also implicated, specifically, Messrs. [REDACTED] (LSF-KEB’s legal representative in Korea), [REDACTED] and [REDACTED] (Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation, p. 35). The FSC recommended dismissal of Messrs. [REDACTED] and [REDACTED] all of whom still served on KEB’s Board at that time (Exhibit C-284, FSS, Notice of Instruction Regarding Operation of Board of Directors, 28 December 2011, p. 10) and taking a measure against Mr. [REDACTED] that was “equivalent to a recommendation for dismissal from office” (Counter-Memorial, para. 343).

244. Hana and Lone Star executed an Amended and Restated Share Purchase Agreement on 3 December 2011, by which LSF-KEB agreed to a USD 832.2 million price reduction as compared to the Hana SPA and to sell its 51.02% shareholding in KEB to Hana for USD 3.7 billion (*i.e.*, KRW 11,900 per share).²⁷¹
245. On 5 December 2011, Hana submitted a new application to the FSC, with updated information on Hana's business plan for KEB, as well as the terms of the parties' amended agreement.²⁷²
246. The FSC eventually approved the Hana application on 27 January 2012.
247. In light of these developments, Lone Star contends that the Respondent breached its Treaty obligations and in particular Fair and Equitable Treatment, including the duty of good faith, in relation, at the very least, with the imposition (as they see it) of a price reduction. These events will be canvassed in detail below starting at paragraph 729.

V. JURISDICTION

248. The Claimants invoke protection under both the 1976 BIT and the 2011 BIT. The Respondent denies that the Tribunal has jurisdiction under either BIT.

A. BURDEN OF PROOF ON JURISDICTION

249. The Respondent contends that the Claimants bear the burden of establishing the Tribunal's jurisdiction, including the facts and each element of their jurisdictional theory.²⁷³ By contrast, the Claimants submit that the "universally accepted principle in international law is that each party bears proving *the facts* supporting its claim or defense," and the

²⁷¹ Exhibit C-280, Amended and Restated SPA Between Lone Star and Hana.

²⁷² Exhibit R-105, Hana Financial Group Inc., "Application for Preliminary Approval of Incorporation of a Subsidiary into Holding Company," 5 December 2011.

²⁷³ Counter-Memorial, para. 594; Rejoinder, paras. 193 *et seq.*; TD19, 4659:19-4660:19; TD17, 4275:13-4276:19 (citing Exhibit RA-251, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 48; Exhibit RA-033, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 678; Exhibit RA-100, *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, 30 June 2011, para. 98). According to the Respondent, the Claimants must also establish that consent exists: TD19, 4662:20-4663:12.

Respondent bears the burden of establishing all of the factual elements for its jurisdictional objections.²⁷⁴

The Tribunal's Ruling on the Burden of Proof

250. In the Tribunal's view the Claimants overstate the burden on the Respondent. The Claimants' assertion that "the Respondent bears the burden of establishing the factual elements of all of its jurisdictional objections" conflates facts and legal arguments asserted by the Claimants which are challenged by the Respondent, in which circumstance the burden of proof continues to rest on the Claimant to establish their version on a balance of probabilities, and facts and legal argument extraneous to the Claimants' case on jurisdiction (for example facts and legal argument necessary to support a limitation defence) which are for the Respondent to establish on a balance of probabilities. A challenge by the Respondent to a fact essential to the Claimants' case on jurisdiction does not reverse the burden of proof onto the Respondent. On the other hand, where (as here) the Respondent raises a limitation defence, its allegation (for example) that the Claimants knew of the factual elements of the dispute prior to the entry into force of the 2011 BIT, and that the Claimants are therefore (the Respondent argues) barred from its protection, is for the Respondent to prove. The burden in that case does not shift to the Claimants to disprove the Respondent's version of events.

B. OUTLINE OF THE RESPONDENT'S OBJECTIONS TO JURISDICTION

251. In summary, the Respondent contends that contrary to the Claimants' assertions
- (a) The 2011 BIT is not retroactive as to disputes, acts or omissions that arose or occurred before the BIT's entry into force on 27 March 2011 and does not cover disputes that crystallised before that date. The Respondent asserts that the Claimants' new "continuous protection" theory, which was raised for the first time in the Claimants' Sur-Reply, ignores the plain text of the 2011 BIT.

The Claimants counter that the Tribunal has jurisdiction *ratione temporis* over this dispute. Korea and the BLEU countries established a transitional regime between

²⁷⁴ Claimants' Sur-Reply on Jurisdiction, 31 March 2015 ("Sur-Reply"), paras. 17-22 [emphasis original].

the 1976 and 2011 BIT to ensure continuous protection for their respective investors that span the successive BITs, and, in any event, the Respondent's acts continued and culminated after the 2011 BIT entered into force.

- (b) All of the claims are barred by the 2011 BIT's statute of limitations as the Claimants knew of the events that gave rise to the "KEB Sale Dispute" and "Taxation Dispute" prior to 21 November 2008. The Claimants submit that the limitation period does not bar the Claimants' claims as they are based on events as recent as May 2013.
- (c) The Claimants lack standing under the ICSID Convention and the 2011 BIT to assert their tax related claims as the taxes were assessed on their parent companies (not the Claimants).²⁷⁵

The Claimants respond that they have "standing" to pursue all their claims because even if a showing of injury were a jurisdictional requirement, which the Claimants deny, those claims are based on their rights as Belgian shareholders, not the rights of others in the Lone Star group.

252. More particularly, with respect to the *ratione temporis* objection, the Respondent alleges with respect to the 1976 BIT that Lone Star's investments are excluded from the definition of "investment" because by its terms it applies only to "direct or indirect contribution[s] of capital and any other kind of assets, invested or reinvested in enterprises in the field of agriculture, industry, mining, forestry, communication and tourism."²⁷⁶ Nevertheless, the Claimants contend, those assets also qualify for protection as "rights and interests" under Articles 1(1), 1(2) and 5(1) of the 1976 BIT.²⁷⁷ According to the Respondent, none of the Claimants' assets qualify as "investments" under the 1976 BIT.²⁷⁸
253. With respect to the 2011 BIT, the Respondent refers to the requirements for the Claimants to qualify as protected investors:

²⁷⁵ Counter-Memorial, para. 593.

²⁷⁶ Counter-Memorial, para. 698; see also Exhibit RA-001, 1976 BIT, Art. 3(1).

²⁷⁷ Exhibit RA-001, 1976 BIT, Arts. 1(1)-(2), 5(1).

²⁷⁸ Counter-Memorial, para. 699.

Together, the ICSID Convention and the 2011 BIT contain three essential requirements for standing, all of which must be satisfied in order for a claimant to be able to assert a claim before ICSID pursuant to the BIT. First, under both the ICSID Convention and the 2011 BIT, the claimant must be a national of Belgium or Luxembourg. This is a basic limitation of the consent that Korea has given as a party to the ICSID Convention and the Korea-Belgium BIT. Second, the investor must be the owner of an investment covered by the BIT. Third, and most critically for the present case, there must be a detrimental effect on the relevant investment, caused by one or more acts or omissions of the Korean State, to establish both the ICSID Convention requirement of a direct relation of the claim to the investment, and the separate 2011 BIT requirement that the interference by Korea must be derived from a breach of an obligation under the BIT. As explained below, Claimants have failed to fulfill the second and third, critical requirements with respect to their tax claims and therefore lack standing to assert these claims before ICSID.²⁷⁹ [emphasis original]

254. With respect to the 2011 BIT, the Claimants argue that while some of their claims involve continuous or composite wrongful acts that originate as early as 2008,²⁸⁰ in each case, such conduct either: (1) **continued** unabated into the period after the 2011 BIT entered into force or (2) constituted a **composite act** that resulted in breach of the 2011 BIT after the new treaty entered into force. In each case, the portion of the misconduct occurring after the entry into force, 27 March 2011, is more than sufficient to constitute a breach of the 2011 BIT, particularly when viewed together with the earlier misconduct for background and context and “to provide evidence of intent.”²⁸¹ The Respondent replies that the Claimants are not assisted by either the 1976 BIT (irrelevant) or the 2011 BIT (not retroactive).²⁸² In any event, all disputes presently in issue “crystallised” before the 2011 BIT entered into force and none of them is actionable under that treaty.²⁸³

²⁷⁹ Counter-Memorial, para. 604.

²⁸⁰ See Reply, paras. 1162-1167 (listing the events giving rise to the dispute in this case, including the HSBC application beginning in early 2008).

²⁸¹ Exhibit CA-690/RA-005, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press: 2002) (“Crawford, *Commentaries on ILC Articles*”), Art. 15, para. 11 (confirming that even “where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter...[t]his need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).”).

²⁸² Counter-Memorial, para. 676.

²⁸³ Counter-Memorial, para. 724; Rejoinder, para. 366.

255. The Respondent states in addition to the above that:

- (1) Korea never agreed to arbitrate tax disputes under the Korea-Belgium Tax Treaty;²⁸⁴
- (2) the Claimants have failed to establish that they are in fact Belgian nationals entitled to protection under either the 1976 BIT or the 2011 BIT;²⁸⁵
- (3) the Claimants do not have standing to pursue their tax claims under either BIT;²⁸⁶ and
- (4) in any event, the claims are foreclosed by the 5-year time limitation in Article 8(7) of the 2011 BIT,²⁸⁷ which provides a cut-off date of 21 November 2007.²⁸⁸

C. THE CLAIMANTS INVOKE THE PROTECTION OF THE 1976 BIT

256. The Respondent contends that the Tribunal ought not to entertain the late-blooming invocation of the 1976 BIT which, as noted, surfaced only in the Claimants' Sur-Reply.²⁸⁹ The Claimants did not plead protection of the 1976 BIT in their Notice of Arbitration, Request for Arbitration, in their Memorial or in their Opposition to Bifurcation.²⁹⁰ In support of this position, Korea cites the ICSID Institution Rules, the ICSID Arbitration Rules and the Tribunal's 8 July 2013 Decision on Procedural Issues where the Tribunal, as then constituted, explained:

²⁸⁴ Counter-Memorial, para. 605.

²⁸⁵ Counter-Memorial, para. 618.

²⁸⁶ Counter-Memorial, para. 654.

²⁸⁷ Counter-Memorial, para. 773.

²⁸⁸ Rejoinder, para. 430.

²⁸⁹ Rejoinder, Section III.A.2.a. See Reply, paras. 1053 *et seq.* The 1976 BIT as a basis for jurisdiction was only affirmatively invoked by the Claimants in their Sur-Reply, para. 31. See also TD18, 4416:10-4419:3 where the Claimants explain they always contended jurisdiction under 2011 BIT, but responded to the Respondent's 1976 BIT arguments, first made in the Respondent's Rejoinder, and ultimately invoked the 1976 BIT upon the Respondent's "offer" as an alternative jurisdictional basis).

²⁹⁰ TD17, 4271:7 *et seq.*

[A] claimant's memorial must plead a positive case on jurisdiction in an ICSID arbitration. ICSID Arbitration Rule 31(3) requires a memorial to contain "a statement of all relevant facts; a statement of law; and the submissions"; and there is no reason to interpret these requirements as excluding a claimant's case on jurisdiction.²⁹¹

The Tribunal went on to hold that the "Claimants must plead their positive case on jurisdiction ... in their Memorial."²⁹²

257. While pressing the timeliness objection, the Respondent has fully responded in its Rejoinder to the Claimants' contentions under the 1976 BIT²⁹³ and in the Tribunal's view has not established any prejudice. Accordingly, the Tribunal dismisses the "timeliness" objection and will proceed to address the applicability of the 1976 BIT on its merits, the more so as the Tribunal has a duty to ascertain *proprio motu* that it has jurisdiction over a case submitted to it.
- (1) **Do the Claimants' Korean Assets Qualify as "Investments" Within the Scope of the 1976 BIT?**

258. The scope of protection under the 1976 BIT is set out in part in Article 1:

Article 1

(1) All existing and future investments, goods, rights and interests belonging directly or indirectly to nationals or legal persons of one of the Contracting Parties shall enjoy fair and equitable treatment in the territory of the other Contracting Party.

(2) Such investments, goods, rights and interests shall also enjoy continuous protection and security, excluding all unjustified or discriminatory measures which would "de jure" or "de facto" hinder their management, maintenance, utilization, enjoyment, or liquidation.

*(3) The protection guaranteed by paragraphs 1 and 2 of this Article shall at least be equal to that enjoyed by the nationals or legal persons of any third State and may in no case be less favourable than that recognized by international law.*²⁹⁴ [emphasis added]

²⁹¹ Decision on Procedural Issues, para. 12.

²⁹² Decision on Procedural Issues, para. 14.

²⁹³ Rejoinder, paras. 25-45.

²⁹⁴ Exhibit RA-001, 1976 BIT, Art. 1.

259. Article 3 of the 1976 BIT defines the protected class of investments as follows:

Article 3

(1) the term "investments" shall comprise every direct or indirect contribution of capital and any other kind of assets, invested or reinvested in enterprises in the field of agriculture, industry, mining, forestry, communications and tourism.

The following shall more particularly, though not exclusively, be considered as investments within the meaning of the present Agreement:

(a) Movable and immovable property as well as any other right "in rem" such as mortgages, pledges, usufructs and similar rights;

(b) Shares and other kinds of interest in companies;

(c) Debts and rights to any performance having economic value;

(d) Copyrights, marks, patents, technical processes, trade-names, trade-marks and goodwill;

(e) Concessions under public law.²⁹⁵ [emphasis added]

260. In support of coverage, the Claimants contend that properly understood, the sub-category "industry" in Article 3 covers the financial, construction and commercial real estate property sectors, and that in any event the 1976 BIT refers to "rights and interests" as a free-standing subject matter. Whatever else might be said, the Claimants say they possessed "rights and interests" in Korea from 1999 onwards within the meaning of Article 1.

261. In support of their interpretation, the Claimants rely upon:

(a)

[REDACTED]

[REDACTED] In Procedural Order No. 8 dated 5 January 2015, the Tribunal declined to treat these letters as submissions by non-disputing parties.

²⁹⁵ Exhibit RA-001, 1976 BIT, Art. 3.

²⁹⁶ Exhibit C-891, Letter to the Tribunal from the Deputy Prime Minister and Minister of Foreign Affairs, Foreign Trade and European Affairs of the Kingdom of Belgium, 4 September 2014; Exhibit C-892, Letter to the Tribunal from the Minister of Foreign and European Affairs of the Grand-Duchy of Luxembourg, 5 September 2014.

²⁹⁷ Reply, para. 1059.

They were accepted as the Claimants' exhibits. The Tribunal noted the Claimants' disclosure of their role in drafting the letters;²⁹⁸ and

- (b) the expert reports of former Judge [REDACTED] and of Professor [REDACTED] and Dr. [REDACTED]

262. The Respondent advances a number of objections in opposition to the Claimants' reliance on the 1976 BIT:

- (a) Article 3 of the 1976 BIT has a much narrower definition of "investment" than the 2011 BIT, being restricted to "direct or indirect contribution[s] of capital and any other kind of assets, invested or reinvested in enterprises in the field of agriculture, industry, mining, forestry, communications and tourism."²⁹⁹ The Claimants did not invest in the listed sectors, according to the Respondent, and indeed in their Memorial the Claimants define their investments in Korea as having been made in the "core economic sectors" of "banking, commercial leasing, [and] construction,"³⁰⁰ none of which are among the above-quoted economic sectors covered under the 1976 BIT;
- (b) the Respondent says that "in contrast to the shallow and ahistorical analysis presented by the Claimants and their experts, Korea has collected contemporaneous evidence of the negotiating history of the successive Korea-BLEU BITs,"³⁰¹

²⁹⁸ Procedural Order No. 8, 5 January 2015, paras. 30-31.

²⁹⁹ Exhibit RA-001, 1976 BIT, Art. 3(1).

³⁰⁰ Memorial, para. 471.

³⁰¹ Rejoinder, para. 202. *See also*, Rejoinder, para. 962, n. 2213 (In this regard, Korea notes that, due to the Claimants' "radical shift" in jurisdictional theory, circumstances have changed significantly since the time that the Parties exchanged document requests in March 2014. At that time, Korea contended, and the Tribunal agreed, that evidence of the negotiating history of the BLEU-Korea BITs was not material to resolution of the case and would be burdensome to collect. The Claimants' new jurisdictional theory, including their invocation for the first time of the 1976 BIT, their reliance on the BLEU letters, and their experts' inaccurate speculation regarding the intent of the treaty Parties, has now rendered such evidence material to resolution of Korea's jurisdictional objections. Korea collected such evidence after receiving the Claimants' Reply (*see* Witness Statement of Jin-Kyu Jeong, 16 January 2015 ("J.K. Jeong Witness Statement")), paras. 5, 25-26), and presents it here "for the Tribunal's consideration.").

supplemented by a witness statement from Korea's chief negotiator of the 2011 BIT (Mr. Jin-Kyu Jeong), and other experts including Professor [REDACTED]³⁰²

- (c) the Claimants' "procrustean attempt to shoehorn all of their investments into the field of 'industry' is inconsistent with the 1976 BIT's plain language, its historical context, and its object and purpose;"³⁰³ and
- (d) the Claimants cannot rely on the reference to "rights and interests" in Article 1 which do not, in the Respondent's view, constitute an independent category of assets entitled to protection outside the limited scope of "investments" defined in Article 3, because it is illogical to interpret the phrase "rights and interests" in the BIT as unfettered by the limitation of the six covered fields of investments to which the 1976 BIT applies³⁰⁴ as to do so would render the six category limitations wholly meaningless.

(2) The Travaux Préparatoires

263. The Respondent asserts that information concerning the 1976 BIT negotiations is limited.³⁰⁵ It seems that from the early 1970s, Belgium adopted a sector-based approach. The Respondent cites a 1988 Report from the United Nations Centre for Transitional Corporations which offered the opinion that lists of categories "limited application of the treaty to these six specified fields, 'to the exclusion, for example, of investments in banking and insurance.'"³⁰⁶

264. According to the Respondent, it was not until Korea joined the OECD in 1996 that it removed the last barriers to foreign direct investment, which resulted in the liberalisation

³⁰² Rejoinder, para. 202.

³⁰³ Rejoinder, para. 194, citing Reply, paras. 1102-1105.

³⁰⁴ Rejoinder, para. 195.

³⁰⁵ Rejoinder, para. 204.

³⁰⁶ Rejoinder, para. 211, citing **Exhibit RA-294**, United Nations Centre for Transnational Corporations, "Bilateral Investment Treaties" (1988), U.N. Document E.88.II.A.1 ST/CTC/65, para. 67. See also Expert Report of [REDACTED] 18 January 2015 ("[REDACTED] Expert Report"), paras. 40, 44.

of its financial sector.³⁰⁷ Korea subsequently allowed foreign companies to be majority shareholders in domestic banks (1998),³⁰⁸ real estate leasing services (1998),³⁰⁹ and construction operations (1996).³¹⁰

(3) The Transition to the 2011 BIT

265. According to the Respondent, negotiators for Korea and BLEU reached more or less an agreement on a text for a new BIT at meetings in Seoul on 15 and 16 September 2005.³¹¹

The new provisions included:

- (a) an expanded definition of “investments,” that abandoned the closed list of six covered sectors in the 1976 BIT in favour of a broader definition that included “every kind of asset owned or controlled” by a covered investor;³¹²
- (b) a dispute resolution mechanism limited to “an alleged breach of an obligation under **this Agreement**;³¹³
- (c) a cut-off provision in Article 11 to make clear that where a “dispute” existed prior to 27 March 2011 even though the parties had not yet initiated a formal dispute

³⁰⁷ Expert Report of [REDACTED] 23 January 2015 (“[REDACTED] First Expert Report”), para. 35 (“When Korea acceded to the OECD in 1996, the Korean government agreed to a comprehensive set of financial sector liberalization reforms, in line with the OECD’s Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Transactions ... Until this time the Korean financial sector remained virtually closed to foreigners.”).

³⁰⁸ [REDACTED] First Expert Report, para. 43.

³⁰⁹ [REDACTED] First Expert Report, para. 44 (although Korean laws permitted limited foreign ownership in real estate leasing services beginning in 1995).

³¹⁰ [REDACTED] First Expert Report, paras. 45-46 (although Korean laws permitted limited foreign ownership in construction beginning in 1984).

³¹¹ J.K. Jeong Witness Statement, para. 24. In testimony to this Tribunal, Mr. Jin-Kyu Jeong who led the Korean delegation, representing the Ministry of Foreign Affairs and Trade, testified that the delegations from Korea and BLEU reached agreement in principle on almost all terms, with the exception of certain provisions related to [REDACTED]

³¹² Exhibit C-001, 2011 BIT, Art. 1(1) (“‘investments’ means every kind of asset owned or controlled, directly or indirectly, by an investor of one Contracting Party in the territory of the other Contracting Party...”).

³¹³ Exhibit C-001, 2011 BIT, Art. 8(1):

Any dispute between a Contracting Party and an investor of the other Contracting Party derived from an alleged breach of an obligation under this Agreement, including expropriation or nationalization of investments, shall be notified in writing by the first party to take action and shall be, as far as possible, settled by the parties to the dispute in an amicable way. The notification shall be accompanied by a sufficiently detailed memorandum.

resolution process, such a dispute would continue to be governed by the 1976 BIT.³¹⁴

266. The Claimants rely on the expert evidence of former Judge [REDACTED] Professor [REDACTED] and Dr. [REDACTED] to argue that the object and purpose of the 1976 BIT (“to promote economic cooperation and foster a favorable investment environment”) necessitate a liberal construction of the term “industry.”³¹⁵

267. The Respondent counters that:

- (a) the main rule of interpretation enunciated in Article 31 of the *Vienna Convention on the Law of Treaties* (the “VCLT”) is that the interpretation of a treaty provision must first and foremost be interpreted in light of its “ordinary meaning.”³¹⁶ The Parties cite numerous dictionary definitions in Korean, French and English which they say support their respective definitions of “industry;”³¹⁷
- (b) in terms of “the context,” which Article 31 of the VCLT requires to be considered, the term “industry” appears in Article 3(1) of the 1976 BIT in a specifically negotiated, closed list of six economic fields. The boundaries of the term “industry”

³¹⁴ J.K. Jeong Witness Statement, para. 39; Rejoinder, para. 246.

³¹⁵ Reply, para. 1103, citing, *inter alia*, Exhibit CWE-037, Expert Report of [REDACTED] 26 September 2014 (“[REDACTED] First Expert Report”), p. 20; Exhibit CWE-036, Expert Report of [REDACTED] and [REDACTED] 22 September 2014 (“[REDACTED] and [REDACTED] First Expert Report”), para. 90.

³¹⁶ Rejoinder, para. 258, referring to Exhibit CA-074 / RA-028, *Vienna Convention on the Law of Treaties* (“VCLT”), Art. 31(1). The full text of Article 31(1) states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

³¹⁷ See, e.g., Exhibit R-489, “Industry,” *Cambridge Dictionaries Online* (“the companies and activities involved in the production of goods for sale, esp. in a factory”); Exhibit R-490, “Industry,” *American Heritage Dictionary* (Houghton Mifflin Harcourt: 2014) (“The sector of an economy made up of manufacturing enterprises”); Exhibit R-491, “Industry,” *merriam-webster.com* (“a department or branch of a craft, art, business, or manufacture; especially: one that employs a large personnel and capital especially in manufacturing ... manufacturing activity as a whole”). See also Rejoinder, para. 262, referring to Exhibit R-233, 1976 BIT (Dutch-French version) (“Article 3(1) in the French version uses the phrase ‘dans les entreprises...industrielles.’ In French, the term ‘entreprise industrielle’ refers exclusively to businesses that convert primary materials into finished products, *i.e.* manufacturing businesses”); Exhibit R-390, “nijverheid,” *Van Dale* (“The Dutch term ‘nijverheid’ refers exclusively to ‘the activity of processing raw materials.’ It is synonymous with the Dutch term ‘industrie’ which is defined as ‘large-scale production in factories’); Exhibit R-233, 1976 BIT (Korean version) (“Article 3(1) in the Korean version of the 1976 BIT uses the term ‘gong-eob (공업 / 工業).’ The term ‘gong-eob’ refers only to manufacturing and does not include any other economic activity.”). See further [REDACTED] Expert Report, paras. 52-55.

must respect what is expressed or implied by those other categories, namely “assets invested or reinvested in enterprises **in the field of agriculture, industry, mining, forestry, communications and tourism;**”³¹⁸

- (c) the word “industry” appears as a “distinct” and individual “field,” one of six enumerated ones, rather than some type of “meta-field” encompassing all others. The principle of *effet utile* requires the Tribunal to reject the Claimants’ approach since it would render meaningless the other five terms in the set.³¹⁹ In this regard, the Respondent also relies on the principles of *ejusdem generis* and *expressio unius est exclusio alterius*;³²⁰ and
- (d) none of the Claimants’ investments qualified as an “enterprise in the field of ‘industry.’”³²¹

(4) “Rights and Interests” under the 1976 BIT

268. In the alternative, the Claimants rely on Article 1(1) of the 1976 BIT, which guarantees Fair and Equitable Treatment to “[a]ll existing and future investments, goods, *rights and*

³¹⁸ Rejoinder, paras. 264-265, referring to **Exhibit RA-001**, 1976 BIT, Art. 3(1) [emphasis added].

³¹⁹ Rejoinder, para. 266; [REDACTED] Expert Report, para. 53 (“It is necessary to read the text in full and not to omit the reference to “enterprises” in the field of [...] industry. (This is also the reason for its translation by the term “industrial enterprise” in the French version of the treaty.)”). See also **Exhibit RA-012**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 57 (“If the final, general term of the MFN clause, ‘all other matters’, encompassed everything mentioned in the BIT ... it would render the first two specific terms meaningless – the BIT could have stated only the final, general term and it would have had the same meaning.”).

³²⁰ Rejoinder, paras. 267-268 and n. 506 (“*Expressio Unius Est Exclusio Alterius*: A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative”); **Exhibit RA-365**, *JCS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 310 (“Several distinguished tribunals have [] relied [on the maxim *expressio unius est exclusio alterius*] ... in order to conclude that, where a treaty lists certain exceptions to MFN treatment, any treatment not specifically excluded is necessarily covered by the MFN clause.”).

³²¹ Rejoinder para. 275 (With respect to the Claimants’ investments, “[i]nvestments in banking or finance were neither allowed in Korea nor eligible for foreign investment guarantees at the time the parties negotiated and entered into the 1976 BIT.”). See also [REDACTED] Expert Report, para. 40; [REDACTED] First Expert Report, para. 34; Rejoinder, paras. 276-278 (In the Respondent’s view, Claimant Star Holdings owned an office building in Seoul; however, the act of adding the term “industry” to the description of an economic sector that is unrelated to “industry” does not convert real estate into a protected category. As to the purchase of “a struggling lease finance company” called Star Lease, the Claimants describe their acquisition of Star Lease as a “large investment in the real estate industry.” The Respondent argues that “[r]eal estate is not one of the six fields of investment covered by the 1976 BIT.” In 2003, Claimants Kukdong Holdings I and Kukdong Holdings II acquired Kukdong, a “commercial construction company.” The Claimants now describe Kukdong as an enterprise operating in the “real estate and construction industries” but, according to the Respondent, applying the “industry” label does not change the nature of the investments.).

interests belonging directly or indirectly to nationals or legal persons of one of the Contracting Parties ...”³²² The Claimants argue that “rights and interests” constitute a separate and independent category of protected assets. Inclusion of the phrase “rights and interests” in the Fair and Equitable Treatment provision of the BIT shows that the parties “deliberately conferred protection on a much *broader* array of property interests” and thus intended the Treaty to have a scope that was not limited to investments.³²³ Since they acquired “rights and interests” in assets in Korea prior to 27 March 2011, they are covered under the 1976 BIT, even if their investments are not in any of the six sectors identified in the definition of “investment.”³²⁴

269. The Respondent contends that to detach the term “rights and interest” from the term “investment” would eviscerate the economic sector limitations and deprive the definition of investment of any useful effect or *effet utile*. Contrary to the Claimants’ interpretation, the actual meaning of the terms “goods, rights and interests” derives from, and must be linked to, some type of protected investment.

(5) The Claimants Contend that the Korean Investment Treaties Promised “Continuous” Protection

270. The Parties contest the significance of Article 12(4) of the 2011 BIT which provides:

*Upon entry into force of the [2011 BIT], the [1976 BIT] shall be terminated and replaced by the [2011 BIT].*³²⁵ [emphasis added]

³²² Exhibit RA-001, 1976 BIT, Art. 1(1) [emphasis added].

³²³ Reply, para. 1006, citing Exhibit RA-001, 1976 BIT, Art. 1(1) (“All existing and future investments, goods, rights and interests belonging directly or indirectly to nationals or legal persons of one of the Contracting Parties shall enjoy fair and equitable treatment in the territory of the other Contracting Party.”); Art. 1(2) (“Such investments, goods, rights and interests shall also enjoy continuous protection and security, excluding all unjustified or discriminatory measures which would ‘de jure’ or ‘de facto’ hinder their management, maintenance, utilization, enjoyment, or liquidation.”); Art. 5(1) (“The nationals or legal persons of one Contracting Party may not be deprived, either directly or indirectly, of the property or enjoyment of their investments, goods, rights and interests situated in the territory of the other Contracting Party ...”).

³²⁴ Reply, para. 1106.

³²⁵ Exhibit C-001, 2011 BIT, Art. 12(4). On this point, the Claimants also rely on the opinion of Judge [REDACTED] for the proposition that “any conduct alleged to have violated the substantive provisions of the 1976 BIT necessarily gives rise to a dispute ‘derived from an alleged breach of an obligation under’ the 2011 BIT too;” see Reply, para. 1070, quoting Exhibit CWE-037, [REDACTED] First Expert Report, p. 9.

271. The Claimants focus on the word “replaced” in the phrase “terminated and replaced” and argue that “[t]he use of the word ‘replaced’ in Article 12[4] reflects [an] intent to ensure continuous protection [for investments in Korea].”³²⁶ The Claimants then contend that the “continuous protection” afforded by the “language of Article 12(4)” enables “claims under the 1976 BIT that were pending up to the entry into force of the 2011 BIT ... [to] come under the protection of the 2011 BIT.”³²⁷
272. The Claimants argue that Article 11 of the 2011 BIT “provides further compelling evidence that the Contracting Parties sought to extend the 2011 BIT’s coverage to disputes and claims concerning government misconduct that occurred both before and after the 2011 BIT’s entry into force.”³²⁸
273. Finally, the Most-Favoured Nation provisions in the two Treaties require Korea to afford a BLEU investor treatment no less favourable than “that enjoyed by nationals or legal person of any *third State*”³²⁹ [emphasis added]. The Claimants’ experts, Professor [REDACTED] and Dr. [REDACTED] contend that these most-favoured-nation clauses “lend support by *analogy* to Claimants’ interpretation of the 2011 BIT that ensures that investors under the 1976 BIT **continue to enjoy**, and are not summarily cut off from, legal protections conferred on investors under the 2011 BIT”³³⁰ even if their claims do not otherwise meet the jurisdictional requirements of the 1976 BIT.³³¹
274. The Respondent’s basic response to the “continuous coverage” argument is that the Claimants’ investments were never covered under the 1976 BIT and while the Claimants

³²⁶ Reply, para. 1063. See also Exhibit CWE-037, [REDACTED] First Expert Report, p. 6; Exhibit CWE-036, [REDACTED] and [REDACTED] First Expert Report, paras. 14-15, 19-20.

³²⁷ Reply, para. 1063, citing Exhibit CWE-036, [REDACTED] & [REDACTED] First Expert Report, para. 48.

³²⁸ Reply, para. 1066. See also Exhibit CWE-037, [REDACTED] First Expert Report, pp. 6-10.

³²⁹ See Exhibit RA-001, 1976 BIT, Art. 1(3) (“The protection guaranteed by paragraphs 1 and 2 of this Article shall at least be equal to that enjoyed by the nationals or legal persons of any third State and may in no case be less favourable than that recognized by international law.”); Exhibit C-001, 2011 BIT, Art. 3(2) (“Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards the operation, management, maintenance, use, enjoyment and sale or other disposal of their investments, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to investors.”).

³³⁰ Exhibit CWE-036, [REDACTED] and [REDACTED] First Expert Report, para. 73 [emphasis added].

³³¹ Exhibit CWE-036, [REDACTED] and [REDACTED] First Expert Report, paras. 71-75.

acquired rights under the 2011 BIT, the absence of coverage under the 1976 BIT destroys the basis for any “continuous coverage” argument.

275. As to Article 8(1) of the 2011 BIT, the Respondent points out that in the dispute resolution clause the Contracting Parties expressly limited the scope of their consent to arbitration to disputes derived from an alleged breach of an obligation “under **this** [2011] agreement” and the words “under **this** [2011] Agreement” excludes disputes derived from an alleged breach of any other instrument (including the 1976 BIT).³³² *Jan de Nul v. Egypt* is cited for its discussion of Article 28 of the VCLT, which provides that treaties are non-retroactive, unless otherwise established.³³³ The *Jan de Nul* tribunal found that the new BIT did not foreclose claims under the old BIT.³³⁴ The Respondent says the circumstances here dictate the opposite conclusion. Citing the *Jan de Nul* analysis of retroactivity, the Respondent relies not only on what it considers the plain language of Article 8(1), but the language in Article 8(1) “to prevent the [2011] BIT from becoming a vehicle for arbitration of disputes that did not involve alleged breaches of the [2011] BIT.”³³⁵

³³² Rejoinder, paras. 296-297, referring to **Exhibit CA-320**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB 04/13, Award, 6 November 2008 (“*Jan de Nul v. Egypt*”), paras. 136-137: “[T]he Tribunal had to determine whether claims for violations of the 1977 BLEU–Egypt BIT could be adjudicated by a tribunal exercising jurisdiction under the subsequent 2002 BLEU–Egypt BIT. The tribunal held that it could apply the provisions of the 1977 BLEU–Egypt BIT only if ‘the dispute resolution clause of the [successor treaty] (the 2002 BIT) contain[ed] no restriction with respect to the applicable law.’”

According to Mr. Jin-Kyu Jeong of the Ministry of Foreign Affairs and Trade, Korea proposed [REDACTED]

³³³ **Exhibit CA-320**, *Jan de Nul v. Egypt*, para. 132.

³³⁴ **Exhibit CA-320**, *Jan de Nul v. Egypt*, paras. 136-137.

³³⁵ Rejoinder, paras. 295-296. *See also* J.K. Jeong Witness Statement, paras. 34-35:

[REDACTED]

276. As to Article 12(4) of the 2011 BIT, if there was no violation of the 1976 BIT, then even on the Claimants' interpretation there is no carrying forward to a breach of the 2011 BIT. In any event, where the word "replaced" is coupled with the word "terminated" in the phrase "terminated and replaced," it is not plausible to interpret the phrase "terminated and replaced" as equivalent to "continued."³³⁶
277. As to Article 11, the Respondent's position is that, by its terms, Article 11 of the 2011 BIT merely states that the protections of the 1976 BIT will remain available to investors with assets covered by the 1976 BIT who seek resolution of disputes concerning "investments which are subject of a dispute settlement procedure under the [1976 BIT]," while simultaneously excluding those pre-existing disputes from the scope of the 2011 BIT.³³⁷
278. In other words, reading the Treaty provisions together, Article 12(4) of the 2011 BIT terminates the 1976 BIT, but Article 11 clarifies that this termination does not end the possibility of using the dispute resolution procedures of the 1976 BIT for matters that relate to Government measures taken prior to 27 March 2011, if such procedure has already been started.³³⁸

³³⁶ Rejoinder, para. 302. According to Korea's lead negotiator, Mr. Jin-Kyu Jeong, it was understood

³³⁷ Rejoinder, para. 310, citing Exhibit C-001, 2011 BIT, Art. 11.

³³⁸ Like the 2011 BIT, the dispute-resolution provision in the 1976 BIT, for its part, applies to "any dispute relating to a measure contrary to this Agreement [*i.e.*, the 1976 BIT]" (Exhibit RA-001, 1976 BIT, Art. 8).

279. As to the Most-Favoured Nation provision, the Claimants concede that the protection is guaranteed *only* to investors that are actually covered by the relevant treaties (*i.e.*, “investors under the 1976 BIT”).³³⁹

The Tribunal’s Ruling on the 1976 BIT

280. The Tribunal has no jurisdiction to address the Claimants’ investments under the 1976 BIT because, in the Tribunal’s view, those investments did not fall into one of the six enumerated categories of “agriculture, industry, mining, forestry, communications and tourism.”³⁴⁰ The 1976 BIT did not cover investments in banking, finance, real estate or construction. Foreign investment in banking, finance, real estate and construction was restricted until after 1998.
281. In the circumstances, the Claimants “transition” arguments are irrelevant, as pre-2011 there were no protected investments or disputes capable of being the subject matter of a “transition.” Equally, there can be no “continuous protection” from the 1976 BIT to the 2011 BIT where there was no protection to begin with under the 1976 BIT.
282. The reference to “rights and interests” in Article 1 of the 1976 BIT does not identify a subject matter independent of an investment in the six protected fields. Otherwise, the six categories are deprived of effect. Even the purchase of a Korean lottery ticket in 1980, for example, would qualify for protection (on the Claimants’ interpretation) as a freestanding bundle of “rights and interests.”
283. In any event, the Tribunal is satisfied that the words “terminated and replaced” in Article 12(4) identify a new beginning in investment protection in Korea rather than the retroactive creation of protection and related claims that otherwise did not exist in Korea under the 1976 BIT. The Most-Favoured Nation argument does not overcome the basic hurdle that Lone Star elected to invest in unprotected fields of economic opportunity.

³³⁹ Reply, paras. 1053 and n. 1959, 1207. See also Exhibit CWE-036, [REDACTED] and [REDACTED] First Expert Report, paras. 14, 49, 73-74.

³⁴⁰ Exhibit RA-001, 1976 BIT, Art. 3(1).

284. While the Claimants' legal experts argue that the object and purpose of the 1976 BIT ("to promote economic cooperation and foster a favorable investment environment") necessitate a liberal construction of the term "industry,"³⁴¹ the more compelling argument is that when the word "industry" is placed on a non-hierarchical list of six economic activities, the framer's intent was not to demote five of the categories as mere examples of the sixth [*i.e.*, industry] and thereby open the door to protection of unlisted areas of economic activity. Such an argument finds no support in the text and context of the 1976 BIT.
285. The Claimants argue that "the extrinsic evidence that the Respondent relies upon – e.g. Mr. Jeong's purpose-built *post hoc* testimony, and principally, a single internal "highly confidential" Korean government report – is neither "context" within the meaning of Article 31 of the VCLT nor *travaux préparatoires* as described in Article 32 and, therefore, is of no relevance to a proper interpretation of the 2011 BIT."³⁴² The Claimants say that this approach "cannot be reconciled with the directive of the VCLT that a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of [the treaty's] object and purpose,³⁴³ as it fails to recognize in the words of the ILC Commentary that "the text must be presumed to be the authentic expression of the intentions of the parties; and that, in the consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."³⁴⁴
286. The Tribunal's analysis rests squarely on the text. Such "context" as has been offered is consistent with the Tribunal's interpretation of the text but is not relied upon. Taking the Claimants' "text" argument to *reductio ad absurdum* suggests that simply describing anything as an "industry" would extend protection under the 1976 BIT to an extent that cannot possibly be taken as "the authentic expression of the intention" of the Parties.

³⁴¹ Reply, para. 1103.

³⁴² Sur-Reply, paras. 81-84.

³⁴³ Sur-Reply, para. 82.

³⁴⁴ Sur-Reply, para. 82.

287. The arguments advanced by former Judge [REDACTED] and Professor [REDACTED] and Dr. [REDACTED] are ultimately not persuasive when read in light of the words of the 1976 BIT's own description of its ambit, in context and having regard to its object and purpose in conformity with Article 31 of the *Vienna Convention on the Law of Treaties*.³⁴⁵
288. The views expressed by the BLEU governments in communications drafted by the Claimants counsel are conclusory rather than analytical and at odds with the Treaty text.
289. The Tribunal finds that the term "industry" as used in the 1976 is not broad enough to cover activities such as general investment, banking or real estate. The Tribunal is guided by the principles of *ejusdem generis* and *expressio unius est exclusio alterius* in its reading of the text, which shows that "industry" must be read in the context of the other enumerated categories of "agriculture ... mining, forestry, communications and tourism." The Tribunal is also persuaded that the *travaux préparatoires* do not support such an expansive reading of the word "industry." As mentioned above, Korea did not permit majority ownership in

³⁴⁵ Exhibit CA-074 / RA-028, VCLT, Art. 31:

SECTION 3. INTERPRETATION OF TREATIES

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

banks, real estate leasing companies and construction until after it joined the OECD in 1996, twenty years after the 1976 BIT.³⁴⁶

290. The Tribunal has noted the various arguments of the Parties about the translation of the word “industry” in the 1976 BIT, but concludes that in light of all the evidence, Lone Star has not established on a balance of probabilities that its investments were protected.

291. The Tribunal therefore lacks jurisdiction under the 1976 BIT for State acts or omissions that occurred before 27 March 2011. Since the HSBC controversy pre-dates 27 March 2011 and the relevant investment was not a protected category under the 1976 BIT, the HSBC controversy is not within the Tribunal’s jurisdiction.³⁴⁷

D. THE CLAIMANTS INVOKE THE PROTECTION OF THE 2011 BIT

(1) General Considerations

292. Article 1(3) of the 2011 BIT defines “investors” as “any natural or juridical persons of one Contracting Party who invest in the territory of the other Contracting Party.”³⁴⁸

293. Article 25(2)(b) of the ICSID Convention defines “[n]ational of another Contracting State” as “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to ... arbitration ...”³⁴⁹

294. According to the Claimants, they have at all relevant times been corporations, *i.e.*, juridical persons, incorporated or constituted in accordance with the laws of Belgium and Luxembourg.³⁵⁰

³⁴⁶ ██████ First Expert Report, paras. 45-46.

³⁴⁷ Having found there to be no actionable wrong under the 1976 BIT, the Tribunal does accept Professor’s ██████ assumption in which he applies HSBC’s control premium to the Hana transaction. *See, e.g., Exhibit CWE-014, ██████ First Expert Report, paras. 61-68.*

³⁴⁸ Exhibit C-001, 2011 BIT, Art. 1(3).

³⁴⁹ ICSID Convention, Art. 25(2)(b).

³⁵⁰ Claimants LSF-KEB Holdings SCA, LSF SLF Holding SCA, Star Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, and Lone Star Capital Management SPRL (together, the “SCA Claimants”), were at all relevant times and (except for Star Holdings SCA, as explained in Section VII.F(2) below)

295. The Claimants contend that Korea consented to arbitration in the BIT while the Claimants consented to arbitration when they submitted the Request for Arbitration on 21 November 2012.³⁵¹ The Claimants were, therefore, “nationals of a Contracting State [Belgium and Luxembourg] other than the State party to the dispute [Korea] on the date on which the parties consented to submit the dispute to arbitration, and fall within the scope of Article 25(2)(b) of the ICSID Convention.”³⁵²
296. For the reasons that follow the Tribunal concludes that under the *ICSID Convention* and the 2011 BIT it has in addition to temporal jurisdiction [*ratione temporis*] both subject matter jurisdiction [*ratione materiae*] to dispose of the investment claims and the tax claims as well as personal jurisdiction [*ratione personae*] over those Claimants who are seeking compensation for alleged violations of the 2011 BIT. The Tribunal has no jurisdiction under the Korea-Belgium Tax Treaty.

(2) Investments Under the 2011 BIT and the ICSID Convention

297. The Claimants submit that they owned investments in Korea covered by both the 2011 BIT and the ICSID Convention.³⁵³ Each of them directly or indirectly held or holds interests in Korea, including shares in Korean companies and claims to money related, *inter alia*, to tax assessments on their Korean investments. LSF-KEB also held claims to performance under contracts having economic value.

are today companies duly organised under the laws of Belgium. Claimant Lone Star Capital Investments S.à.r.l. was at all relevant times and is today a company duly organised under the laws of Luxembourg.

³⁵¹ Memorial, para. 478.

³⁵² Memorial, para. 448.

³⁵³ See generally Memorial, paras. 453-471; Exhibit C-001, 2011 BIT, Arts. 1(1)(b)-(c). Article 1(1) of the BIT defines “investments” as “every kind of asset owned or controlled, directly or indirectly, by an investor of one Contracting Party in the territory of the other Contracting Party,” including (but not limited to) “shares in, stocks and debentures of, and any other form of participation, including minority ones, in a company or any business enterprise and rights or interest derived therefrom,” as well as “claims to money or to any performance under a contract having an economic value.”

298. The Claimants point out that the ICSID Convention does not define “investments.” The term was intentionally left undefined they say so that the Contracting States could delineate the scope of their consent to arbitration.³⁵⁴
299. In this case, the Claimants say, their activities fit within two categories of investment in the BIT. Those categories – shares in companies and claims to money – satisfy any objective definition of investment and therefore fall within the Article 25 of the ICISD Convention.³⁵⁵ The Respondent argues that only one of the eight investors (*i.e.*, LSF-KEB) can claim association with the Contracting State and that its investments fail to meet the requirements of the BIT (and therefore the ICSID Convention)³⁵⁶ for reasons which will be addressed later.

(3) Alleged Breaches of the BIT

300. Korea’s alleged violations include: (i) the arbitrary and discriminatory measures that impair the operation, management, maintenance, use, enjoyment or disposal of investments; (ii) unfair and inequitable treatment; (iii) failure to provide full and continuous protection and security; (iv) failure to provide treatment no less favourable than that accorded to investments and returns of Korean investors or investors of any third State; (v) unlawful expropriation; (vi) failure to observe any other written obligation that may have entered into force with regard to investments in Korea’s territory by investors of Belgium and Luxembourg; and (vii) failure to guarantee to investors the free transfer of their investments and returns.

(4) A Legal Dispute Under Article 25 of the ICSID Convention

301. The Claimants assert that their legal dispute with Korea arises directly out of their investments. Korea has breached its legal obligations under the BIT and those breaches

³⁵⁴ Memorial, para. 466, referring to **Exhibit CA-051**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, para. 27 (“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanisms through which Contracting States can make known, in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Center.”). See also **Exhibit CA-063**, C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press: 2009) (excerpts), pp. 114-115.

³⁵⁵ Memorial, para. 469.

³⁵⁶ Rejoinder, Secs. III(C)(2)(a)-(b).

have inflicted loss on the Claimants' investments. The dispute, the Claimants say, arises directly out of their investments within the meaning of Article 25 of the ICSID Convention.

302. Accordingly, the Claimants state that their claims in this case present both a "dispute between a Contracting Party and an investor of the other Contracting Party derived from an alleged breach of an obligation" under the BIT and a dispute "arising directly out of an investment" under the ICSID Convention.³⁵⁷

(5) Consent to Arbitration

303. According to the Claimants, Korea has consented in writing to submit disputes to ICSID arbitration in Article 8(5) of the BIT, while the Claimants have consented in writing to ICSID arbitration by filing their Request for Arbitration on 21 November 2012.³⁵⁸

304. The Respondent states that it did not consent to arbitrate complaints under the Korea-Belgium Tax Treaty nor, it says, can the Umbrella Clause be used to import consent to such arbitrations. However, the Claimants say that Tax Treaty violations may also be the subject of a BIT violation if brought within the terms of the 2011 BIT, and in particular under Fair and Equitable Treatment.

E. JURISDICTIONAL OBJECTIONS ARISING UNDER THE 2011 BIT

305. It will be recalled that the Claimants take the position that while much of Korea's misconduct took place after the entry into force of the 2011 BIT on 27 March 2011, the roots originate as early as 2008 and that in each case, such misconduct either (1) continued unabated into the period after the 2011 BIT entered into force or (2) constituted a composite act that resulted in breach of the 2011 BIT after the new treaty entered into force. In each case, the portion of the misconduct occurring after 27 March 2011 is more than sufficient to constitute a breach of the 2011 BIT.

306. The Respondent contends that the Claimants' claims fall outside the temporal scope (*ratione temporis*) of the Tribunal's jurisdiction, as limited by the date of entry into force

³⁵⁷ Memorial, para. 477, citing Exhibit C-001, 2011 BIT, Art. 8(1); ICSID Convention, Art. 25(1).

³⁵⁸ Memorial, para. 478.

of the 2011 BIT, which was 27 March 2011. In the Respondent's view, the Tribunal lacks jurisdiction over the Claimants' entire case "because (a) Claimants' claims involve disputes that arose well before the 2011 BIT entered into force, and (b) Claimants impermissibly seek to hold Korea responsible under the BIT for alleged acts and omissions that took place before the BIT entered into force."³⁵⁹

307. The Respondent's basic position is that the Claimants' investments were not protected prior to 27 March 2011. Any relevant dispute crystallised before that date and if it was ever actionable (which is denied), it is no longer actionable. The Tribunal lacks jurisdiction *ratione temporis* pursuant to the plain language of the 2011 BIT and the core international law principle of the non-retroactivity of treaties which is codified in Article 28 of the VCLT.³⁶⁰ The 2011 BIT is not retroactive. The 2011 BIT does not apply and nothing done by Korea since 27 March 2011 constitutes a violation of the 2011 BIT.³⁶¹

(1) The 2011 BIT by its Terms Excludes Liability for "Acts or Situations" Prior to 27 March 2011

308. The Respondent's starting point is that the 2011 BIT is limited by its express terms to "acts or situations"³⁶² arising on or after 27 March 2011. Article 8(1) of the 2011 BIT provides as follows:

Article 8 Settlement of Investment Disputes Between a Contracting Party and An Investor of the Other Contracting Party

1. Any dispute between a Contracting Party and an investor of the other Contracting Party derived from an alleged breach of an obligation under this Agreement, including expropriation or nationalization of investments, shall be notified in writing by the first party to take action and shall be, as far as possible, settled by the parties to the dispute in

³⁵⁹ Counter-Memorial, para. 676.

³⁶⁰ Exhibit CA-074 / RA-028, VCLT, Art. 28.

³⁶¹ Counter-Memorial, paras. 677-678.

³⁶² Counter-Memorial, paras. 678, 681-683; Exhibit CA-041, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 ("*Mondev v. United States*"), para. 68; Exhibit CA-324, *Ambatielos (Greece v. United Kingdom)*, International Court of Justice, Judgment (Preliminary Objection), 1 July 1952, p. 40; Exhibit CA-690 / RA-005, Crawford, *Commentaries on ILC Articles*, Art. 13, para. 9 ("The basic principle stated in article 13 is thus well-established").

*an amicable way. The notification shall be accompanied by a sufficiently detailed memorandum.*³⁶³ [emphasis added]

309. Article 8 of the 2011 BIT uses the phrase “any dispute” and the Claimants argue, relying on the decision of the Permanent Court of International Justice in *Mavrommatis Palestine Concessions*, that “[i]t is well established that, when the parties to a treaty express their consent to arbitrate ‘any dispute,’ they mean exactly that, and therefore the treaty includes within its scope *any* disputes existing at the time of its entry into force, as well as those arising thereafter”³⁶⁴ [emphasis original].
310. The Respondent replies that the critical date is “the moment at which the dispute arose” and in the *Mavrommatis* case the PCIJ defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests.”³⁶⁵ The Respondent says the “KEB Share Acquisition Dispute,” reaches back to Mr. [REDACTED] letters of 2008 and 2009 threatening Korea with international arbitration.³⁶⁶ For the “Tax Theory Dispute,” the Respondent argues a dispute existed as early as 2005.³⁶⁷
311. The Respondent, for its part:
- (a) notes that Article 8 references only obligations “under **this** agreement;”
 - (b) contends that the language of Article 8 cannot be read in isolation from Article 11, which provides an explicit cut-off date.³⁶⁸ Article 11 states:

³⁶³ Exhibit C-001, 2011 BIT, Art. 8(1).

³⁶⁴ Opposition to Bifurcation, para. 59, citing Exhibit CA-284, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, Permanent Court of International Justice, Judgment No. 2, 30 August 1924 (“*Mavrommatis*”), p. 35.

³⁶⁵ Counter-Memorial, para. 701, citing Exhibit CA-284, *Mavrommatis*, p. 11.

³⁶⁶ Rejoinder, paras. 389-392.

³⁶⁷ Rejoinder, paras. 393-397.

³⁶⁸ Counter-Memorial, para. 690 and n. 1636, citing Exhibit CA-339 / RA-107, *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011 (“*ABCI v. Tunisia*”), para. 139; Exhibit RA-122, *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Dissenting Opinion of Professor Stern, 14 February 2011 (“In her dissent, Professor Stern found that Tunisia had not provided consent in writing to the proceeding and thus held that the tribunal lacked competence to hear any of the claims presented.”); Rejoinder, paras. 308-309. See also Exhibit RA-268, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 (“*Salini v. Jordan*”), para. 170 (“Such [‘any dispute’] language does not cover disputes which may have arisen before the entry into force

*The [2011 BIT] shall apply to all investments, whether made before or after its entry into force. The [2011 BIT] shall, however, not be applicable to disputes concerning investments which are subject of a dispute settlement procedure under the [1976 BIT]. The latter Agreement shall continue to apply to these investments, as far as it concerns the disputes referred to.*³⁶⁹

- (c) observes that the 2011 BIT contains no language that enables its application to alleged violations which occurred prior to 27 March 2011; and
- (d) concludes that in the absence of such language, the 2011 BIT has no retroactive effect.³⁷⁰

(2) The General Principle of Non-Retroactivity

312. Article 28 of the *Vienna Convention of the Law on Treaties* codifies the principle of non-retroactivity of treaties:

*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*³⁷¹

313. The ILC Articles also reflect the non-retroactivity doctrine at Article 13, which states:

*An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*³⁷²

of the BIT ..."); Exhibit CA-035, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007 ("*MCI v. Ecuador*"), para. 61.

See further Counter-Memorial, para. 708, referring to Opposition to Bifurcation, para. 59 and n. 97 (referring to, in turn, Exhibit CA-299, *Walter Bau AG (in liquidation) v. Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009 ("*Bau v. Thailand*"), paras. 12.37-12.38; Exhibit CA-272, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 34877, UNCITRAL, Interim Award, 1 December 2008 ("*Chevron v. Ecuador*"), paras. 268-269). The Respondent argues that "while the *Chevron* tribunal rejected the notion that disputes before entry into force fell outside its jurisdiction, it did so on the basis of specific language in the U.S.-Ecuador [BIT]."

³⁶⁹ Exhibit C-001, 2011 BIT, Art. 11.

³⁷⁰ Counter-Memorial, para. 678.

³⁷¹ Exhibit CA-074 / RA-028, VCLT, Art. 28.

³⁷² Exhibit CA-029 / RA-002, ILC Articles, Art. 13.

314. The issue is whether Article 11 of the 2011 BIT leaves the door open to *pre-2011* disputes already properly subject to arbitration under the 1976 BIT:³⁷³

*The Agreement shall apply to all investments, whether made before or after its entry into force. The Present Agreement shall, however, not be applicable to disputes concerning investments which are subject of a dispute settlement procedure under the [1976 BIT]. The latter Agreement shall continue to apply to these investments, as far as it concerns the disputes referred to.*³⁷⁴ [emphasis added]

315. The Respondent contends that Article 11 has a two-fold purpose: it operates both as (a) an exclusion clause, limiting the disputes that may be heard under the 2011 BIT to those arising after 27 March 2011; and (b) it is a savings clause, allowing disputes that already were the “subject of a dispute settlement procedure” under the 1976 BIT to be heard under that BIT (even though the 1976 BIT otherwise was no longer in force once the 2011 BIT entered into force). In the Respondent’s view, the parties chose not to extend the 2011 BIT backward in time to cover disputes that predated its entry into force, but rather extended the 1976 BIT forward in time to cover investments that as of 27 March 2011 were already the “subject of a dispute settlement procedure” under the 1976 BIT.³⁷⁵
316. The Respondent further contends that the majority of investment tribunals have adopted the rule that their jurisdiction is limited to disputes which arose after the treaty entered into force.³⁷⁶ For example, in *Impregilo v. Pakistan*, the relevant BIT provision stated only that

³⁷³ Reply, paras. 1027-1031.

³⁷⁴ Exhibit C-001, 2011 BIT, Art. 11.

³⁷⁵ Counter-Memorial, paras. 687-689, referring to Exhibit RA-108, *ATA Construction Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (“*ATA v. Jordan*”), para. 98; Exhibit RA-013, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (“*Impregilo v. Pakistan*”), para. 300; Exhibit CA-035, *MCI v. Ecuador*, para. 61; Exhibit RA-010, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (“*Generation Ukraine v. Ukraine*”), para. 17.1; Exhibit RA-268, *Salini v. Jordan*, para. 175; Exhibit RA-105, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014 (“*Lao Holdings v. Laos*”), para. 116.

³⁷⁶ See, e.g., Exhibit CA-035, *MCI v. Ecuador*, paras. 61 and 66, where the Tribunal noted:

The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.

[...]

Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.

the treaty applied to “any dispute arising between a contracting Party and the investors of the other.”³⁷⁷ Notwithstanding the lack of any explicit temporal restriction, the *Impregilo* tribunal ruled that “[s]uch language – and the absence of specific provision for retroactivity – infers [*sic*] that disputes that may have arisen before the entry into force of the BIT are not covered.”³⁷⁸

317. The Claimants suggest that the purpose of this clause is to manage the transition between the successive BITs by ensuring that protected investors benefit from continuous, uninterrupted investment protection coverage, while excluding the possibility that such investors will initiate *parallel* proceedings under both BITs concerning the same dispute. For that reason, the Claimants say, “Article 11 carves out only a *narrowly defined* category of pre-existing disputes from the scope of the 2011 – those disputes ‘which are subject of a dispute settlement procedure under the [1976 BIT].’”³⁷⁹

(3) Did the Dispute and the Facts Giving Rise to the Dispute Predate 27 March 2011?

318. It will be recalled (again) that in the Claimants’ view, their claims involve continuous or composite wrongful acts that originate as early as 2008,³⁸⁰ but that in each case, such conduct either (1) continued unabated into the period after the 2011 BIT entered into force or (2) constituted a composite act that resulted in breach of the 2011 BIT after the new treaty entered into force. In each case, the portion of the misconduct occurring after 27 March 2011, is more than sufficient to constitute a breach of the 2011 BIT.
319. The Respondent takes the position that such disputes as existed prior to 27 March 2011 “crystallised” prior to the entry into force of the 2011 BIT and are no longer (if they ever were) actionable. In the Respondent’s view, the critical moment in the jurisdictional inquiry is the point when the conflict of legal views between the parties “crystallised.” If this moment precedes the entry into force of the applicable BIT, the dispute will fall outside of the Tribunal’s jurisdiction. The 1976 BIT ceased to apply *ex proprio vigore* on 27 March

³⁷⁷ Exhibit RA-013, *Impregilo v. Pakistan*, para. 299 (quoting Article 9(1) of the BIT between Italy and Pakistan).

³⁷⁸ Exhibit RA-013, *Impregilo v. Pakistan*, para. 300. See also Exhibit RA-010, *Generation Ukraine v. Ukraine*, para. 17.1; Exhibit RA-108, *ATA v. Jordan*, para. 98; Exhibit RA-268, *Salini v. Jordan*, para. 170.

³⁷⁹ Reply, para. 1029.

³⁸⁰ Reply, paras. 1162-1167.

2011. Thus, according to the Respondent, the disputes that form the basis of Claimants' allegations crystallised before the entry into force of the 2011 BIT, and are therefore beyond the Tribunal's jurisdiction.

320. On this basis, the Respondent argues that the origin of a dispute is closely linked to the parties' articulation of their opposed legal views³⁸¹ as in *ABCI v. Tunisia*, where the tribunal concluded that the moment the claimant put the respondent on notice of its disagreement, the dispute had arisen.³⁸²

³⁸¹ Counter-Memorial, paras. 714-716, citing, *inter alia*, Exhibit RA-024, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007 ("*Vieira v. Chile*"), para. 249. See also Exhibit RA-013, *Impregilo v. Pakistan*, paras. 301-303; Exhibit CA-035, *MCI v. Ecuador*, para. 63; Exhibit RA-007, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 91.

Referring to *Mavrommatis*, the Respondent adopts the definition of dispute as "a disagreement on a point of law or fact, a conflict of legal views" (Counter-Memorial, para. 711, citing Exhibit CA-284, *Mavrommatis*, p. 11). The Respondent asserts that investment tribunals subsequently have adopted and elaborated upon this definition by

identifying the following six elements that mark the origin of a dispute:

- a. a minimum of communication between the parties;
- b. a conflict of interest over a point of law or fact;
- c. a discussion that reflects the fact that both parties have clearly opposite views on a point of law or fact;
- d. a positing of opposition to views of one party to another, either directly or indirectly;
- e. a firm articulation of the disagreement, in words or writing, with or without a formal legal claim; and
- f. clearly identified problems, capable of exposition in concrete terms.

³⁸² Exhibit CA-339 / RA-107, *ABCI v. Tunisia*, paras. 176-177:

La date de naissance du différend en relation avec la période d'application du TBI est une question de fait que le Tribunal doit également déterminer. La Demanderesse n'a pas fait preuve de timidité pour faire savoir au Gouvernement tunisien ses désaccords sur l'ensemble des éléments qui caractérisaient leurs rapports, y compris les considérations de droit et de fait qui, de son avis, justifiaient sa position. Comme l'indique la Défenderesse, il existait déjà en 1990 une abondante correspondance à cet effet. Dans ce contexte, la société ABCI a demandé au Gouvernement tunisien la réalisation de démarches conduisant à un « swift settlement ». La notification du différend, comme dans les affaires Tokios Tokelès et Tradex invoquées par la Défenderesse, est reconnue comme une indication de son existence préalable.

Par conséquent, le Tribunal conclut que le différend était né bien avant la date d'entrée en vigueur du TBI de 1998.

The Tribunal's Ruling

321. The Tribunal agrees with the Respondent that the articulation of the KEB share sale dispute in Mr. [REDACTED] 2008 and 2009 letters constituted the existence of a "dispute" that predated the 2011 BIT. In the Tribunal's view, however, the articulation of a dispute in 2008 and 2009 does not preclude the Tribunal's jurisdiction in respect of events involving the Hana sale after 27 March 2011 despite the echoes in the Hana case (as viewed by the Claimants) of government misbehaviour in the HSBC transaction and earlier attempts by LSF-KEB to sell its controlling interest in KEB.
322. It will be recalled, too, that the Claimants' tax disputes go back even further to 2005, but tax assessments were also imposed after 2011 and thus constitute an element in what the Claimants characterise as an NTS campaign of harassment (which indeed, according to the Claimants is not yet over).³⁸³ As will be discussed, the Tribunal has jurisdiction in respect of the post-2011 tax assessments but those tax claims fail on their merits.

(4) Jurisdiction *Ratione Temporis*

323. It is now convenient to address the Claimants' argument that acts or omissions alleged against the Respondent prior to 27 March 2011 are nevertheless actionable as part of a **composite act** that was not completed until after the BIT entered into force³⁸⁴ or are "continuing" acts or omissions that commenced prior to the date of the 2011 BIT's entry into force but extended past that date.
324. The Claimants state:

As constituent acts of a larger composite breach, the Tribunal is entitled to examine and give substantial weight to acts and omissions that are part of a composite act, even if they happened before the BIT's entry into force.

³⁸³ For example, the Claimants dispute:

- (ii) the 5 March 2012 withholding tax on the proceeds from the sale of its equity stake in KEB to Hana Bank [Exhibit C-361, Letter from SRTO to Hana, 18 January 2012] and;
- (iii) the 11 March 2013 retroactive assessment against Citibank in respect of taxes on KEB dividends paid to LSF-KEB between 2008 and 2011 [Exhibit C-144, Tax Assessment Notice to Citibank Korea Concerning Withholding on Dividends (2008–2011), 11 March 2013].

³⁸⁴ Reply, para. 1124. See also Rejoinder, para. 333.

*Such acts and omissions can be considered "aggravating or mitigating factors" for the events that follow.*³⁸⁵

325. In particular, the Claimants contend:

- (a) the treatment of KEB by Korea resulted in a "composite act of a politically driven campaign of harassment, intimidation, and punitive measures;"³⁸⁶ and
- (b) the "FSC's failure to act on Hana's application to acquire KEB is an 'omission to act' that ... constitutes a continuing act for so long as it lasts."³⁸⁷

326. The Respondent's position is that the acts and omissions allegedly committed by Korea "do not qualify either as a composite act or a continuing act, as those concepts are understood in international law."³⁸⁸

(5) The Claimants Allege that a Campaign of Harassment and Victimization Against Lone Star and its Affiliates Constitutes in the Aggregate a "Composite Act"

327. The ILC Articles define a "composite act" breach as follows:

*The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*³⁸⁹ [emphasis added]

328. The Claimants characterise Korea's actions before the 2011 BIT's entry into force as a concerted campaign by Korea "against Lone Star and its interests in Korea (including the Claimants' investments)"³⁹⁰ constituting a "**composite act** of a politically driven campaign

³⁸⁵ Reply, paras. 1133-1134. The Claimants also assert that the pre-BIT acts and omissions they invoke "provide essential background for understanding Respondent's motives for later actions and severity of Respondent's misconduct."

³⁸⁶ Reply, para. 1131; see also para. 1121 (alleging "FSC's wrongful continuing act of refusing to act on Hana's application to acquire KEB ...").

³⁸⁷ Reply, para. 1139; see also para. 1121 (alleging "Korea's multifaceted campaign of targeted abuse and harassment ...").

³⁸⁸ Rejoinder, para. 335.

³⁸⁹ Exhibit CA-029 / RA-002, ILC Articles, Art. 15(1).

³⁹⁰ Reply, para. 1124. Similarly, in their Memorial, the Claimants argue that Korea had waged a "campaign" of unlawful taxation "against Lone Star." See Memorial, para. 532 ("Respondent's relentless efforts to maximize taxes on the proceeds of Claimants' investments ... were part of the same politically-driven campaign against Lone Star that paralyzed the FSC into inaction"); para. 558 ("[The Claimants' legitimate] expectations were undermined by the

of harassment, intimidation and punitive measures by the Korean authorities³⁹¹ including “[the FSC’s] refusal to approve the application from HSBC;” “abusive tax raids, excessive and overbearing investigations, and unfounded, politically motivated prosecutions;” “pressure on Lone Star to reduce the SPA’s contract price;” “coercion to give up [LSF-KEB’s] right as shareholder of record to vote receive [sic] year-end dividends from KEB;” “and abusive tax withholding [from LSF-KEB].”³⁹²

329. The Respondent’s position is that:

- (a) the Claimants adopt the inconsistent positions that the alleged acts or omissions constitute a “composite act” but are also actionable in themselves.³⁹³ However, the essence of a “composite act” is that it is not complete until each of the composite parts (including those parts post-dating the entry into force of the BIT) are in place. The Respondent refers to Professor James Crawford’s observation that “[A] composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts;”³⁹⁴

NTS’s politically driven campaign to maximize Lone Star’s tax liability”); para. 601 (“With regard to the taxation claims, the NTS’s abusive and unlawful campaign against Lone Star clearly violated due process and procedural propriety”). However, the Claimants did not characterize this particular alleged “campaign” as a composite act.

³⁹¹ Reply, para. 1131 [emphasis added].

³⁹² Reply, paras. 1131, 1134.

³⁹³ Exhibit C-367, Letter from ████████ to D.S. Chin, 11 February 2009 (Mr. ████████ writing in 2009 “on behalf of [Claimant] LSF-KEB,” objected to the FSC’s “refusal to approve HSBC’s application” as a “clear violation of Korean and international law ... [giving rise to] a valid claim against the Korean government under the applicable investment treaty ...”). See also Rejoinder, para. 351.

³⁹⁴ Rejoinder, para. 343 and n. 660 referring to, *inter alia*, Exhibit CA-760, J. Crawford, *State Responsibility: The General Part* (Cambridge University Press: 2013) (excerpts) (“Crawford, *State Responsibility*”), p. 266. Thus, Professor Crawford gives the example of a series of murders which only become a composite act at the point at which, in the aggregate, they can be deemed to amount to genocide, as it is only at that juncture that the murders collectively acquire a different legal character and become a separate breach of international law. Thus, the murders are still individual crimes but they transcend individual status when viewed cumulatively as elements of the distinct offence of genocide. See also Rejoinder, para. 346, n. 672, citing Exhibit CA-760, Crawford, *State Responsibility*”), p. 267 (“there has been an accumulation of acts of killing ... committed with the relevant intent, so as to satisfy the definition contained in ... the Genocide Convention.”).

- (b) the Respondent says the so-called “campaign of harassment” does not in the aggregate rise to the level of a distinct violation of the 2011 BIT,³⁹⁵ and
- (c) the Claimants are not entitled to “‘mix and match’ events, acts or omissions by Korean agencies that impacted one or the other Claimant, or to treat *all* such events, acts and omissions as if they affected *all* of the Claimants.” The doctrine of composite acts does not feature “a transitive property” as between co-claimants. The composite act doctrine does not exempt each claimant from the obligation to prove that the set of acts and omissions that comprise the alleged composite act were directed at it specifically (rather than simply at a co-claimant).³⁹⁶
- (6) **The Claimants Rely on Korea’s Alleged “Continuing Acts” of Misconduct in Relation to the Sale of KEB Shares and the Tax Treatment of its Investments Dating Back to 2004**
330. For present purposes, the claims have been divided into two broad disputes: one is the “KEB Share Acquisition Dispute,” and another is the “Tax Assessments Dispute.”³⁹⁷
331. Article 14 of the ILC Articles defines **continuing act** as “[t]he breach of an international obligation ... having a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation.”³⁹⁸
332. According to the Claimants, the Respondent’s systematic efforts to deprive them of the value of their investments had “a continuing character” from attacks on the 2003 acquisition of KEB shares, to administrative barriers to approval of the sale of KEB shares to the Singapore-based bank DBS (2006), Kookmin Bank (2006), HSBC (2007), and, eventually, Hana Bank (2011–2012).

³⁹⁵ Rejoinder, para. 346. The Respondent explains that while the Claimants rely on the decision in *Tokios Tokelés v. Ukraine*, in that case, “the tribunal expressly concluded that it was *not* ‘a case where numerous individual episodes, separately arising, can be agglomerated to make an international delict’” (Rejoinder, para. 347, referring to **Exhibit CA-071, Tokios Tokelés v. Ukraine**, ICSID Case No. ARB/02/18, Award, 26 July 2007 (“*Tokios Tokelés v. Ukraine*”), para. 13).

³⁹⁶ Rejoinder, para. 340.

³⁹⁷ Memorial, para. 475. *See also* Counter-Memorial, para. 723.

³⁹⁸ Reply, para. 1137, citing **Exhibit CA-029 / RA-002**, ILC Articles, Art. 14.

333. The genesis of the Tax Theory Dispute lies in NTS's use of the "Substance Over Form" principle in its tax assessments on the various claimants and their upstream entities. The Claimants contend that the application of Substance Over Form violated Korea's domestic and international obligations.³⁹⁹
334. The Claimants rely on the decision in *Pac Rim v. El Salvador* to argue that the FSC's failure to approve the Hana application qualifies as an "omission to act" that ... constitutes a continuing act." In *Pac Rim*, the tribunal found that the respondent's failure to grant mining permits to the claimant qualified as a continuing omission.⁴⁰⁰
335. In response to the Claimants' "continuing acts" submission, the Respondent contends:
- (a) that a distinction must be made between a continuing act or omission, on the one hand, and an act or omission with continuing effects, on the other,⁴⁰¹ as is made clear by Article 14(1) of the ILC Articles:

*The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.*⁴⁰² [emphasis added]

- (b) the Claimants ignore the cautious approach to consent to jurisdiction illustrated by *Phosphates in Morocco (Italy v. France)*, in which the Permanent Court of International Justice stated:

[I]t is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and

³⁹⁹ See Memorial, paras. 476, 565.

⁴⁰⁰ Reply, paras. 1138-1139, citing **Exhibit CA-689**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012 ("*Pac Rim v. El Salvador*"), paras. 2.91-2.92. The Respondent argues that *Pac Rim* is distinguishable because, despite the "continuing omission," "there still seemed to be a reasonable possibility, as understood by the Claimant, to receive such permit and concession notwithstanding the passage of time;" whereas in the present case, in contrast, the Claimants perceived the FSC decision to postpone review as tantamount to a "refusal." The Respondent therefore distinguishes between a failure to act (possibly an ongoing omission) and a refusal to act (definitive decision): Rejoinder, para. 362, citing, *inter alia*, **Exhibit CA-689**, *Pac Rim*, para. 2.84 [emphasis added by the Respondent] and para. 3.29 (noting that the claimant alleged that the respondent had "induced the Claimant to understand that despite the missed deadlines [for granting permits] in 2004 or 2007 there was no dispute ...").

⁴⁰¹ Rejoinder, paras. 353-354, referring to, *inter alia*, **Exhibit CA-760**, Crawford, *State Responsibility*, p. 263 ("An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues."); **Exhibit CA-041**, *Mondev v. United States*, para. 58.

⁴⁰² **Exhibit CA-029 / RA-002**, ILC Articles, Art. 14(1).

*consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance.*⁴⁰³
[emphasis added by the Respondent]

- (c) in any event, the disputes characterised by the Claimants as “continuing” actually **crystallised** before the 2011 BIT entered into force on 27 March 2011. Both the dispute relating to the alleged FSC delays and the dispute about NTS tax-related determinations arose prior to the 2011 BIT’s entry into force, and therefore lie outside the temporal scope of the BIT.⁴⁰⁴

(7) The Respondent Also Relies on the Five-Year Limitation in Article 8(7) of the 2011 BIT

336. Article 8(7) of the 2011 BIT provides:

*The investor is not entitled to submit a dispute for resolution according to this Article [i.e., the BIT’s dispute resolution clause] if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.*⁴⁰⁵

337. Article 8(7) requires a determination of when the investor “acquired or should have acquired knowledge of the events giving rise to the dispute”⁴⁰⁶ and the Respondent contends that a “dispute” is objectively determined under international law as “a disagreement on a point of law or fact, a conflict of legal views or of interests.”⁴⁰⁷ Accordingly, the Respondent says, Article 8(7) is triggered when, objectively, the views of the parties became positively opposed, and the parties have brought into focus “[c]learly

⁴⁰³ Rejoinder, para. 374, referring to **Exhibit CA-336**, *Phosphates in Morocco (Italy v. France)*, Permanent Court of International Justice, Case No. 74, Judgment, 14 June 1938, para. 32; see also Rejoinder, para. 377, n. 750, referring to **Exhibit RA-105**, *Lao Holdings v. Laos*, paras. 84-85, 115-116, 120-121. The Respondent argues that, even though the BIT in *Lao Holdings* “did not explicitly exclude pre-existing disputes, such disputes nonetheless were excluded based on the presumption of nonretroactivity.” The Respondent explains that the BIT in that case “excluded jurisdiction over ‘any claim concerning an investment, which arose before [the BIT’s] entry into force.’ Accordingly, such BIT did not explicitly deny jurisdiction over disputes that arose before the BIT’s entry into force; nevertheless, the tribunal found such disputes to transcend the temporal scope of the BIT.” See further **Exhibit CA-299**, *Bau v. Thailand*, para. 9.80 (explaining that “the Claimant wishes not only to apply retroactively, procedural provisions of the 2002 Treaty but also substantive provisions of the 2002 Treaty which did not exist previously.”).

⁴⁰⁴ Rejoinder, para. 386.

⁴⁰⁵ **Exhibit C-001**, 2011 BIT, Art. 8(7).

⁴⁰⁶ See Rejoinder, para. 412.

⁴⁰⁷ Counter-Memorial, para. 701, citing **Exhibit CA-284**, *Mavrommatis*, p. 11.

identified problems, capable of exposition in concrete terms.”⁴⁰⁸ The Claimants fix that date at 21 November 2007 rendering 21 November 2012 as the critical date for the purpose of applying the Article 8(7) five-year limitation.

338. The Respondent states that the Claimants acquired “knowledge of the events giving rise to the dispute” earlier through the actions of the NTS in 2005⁴⁰⁹ and FSC prior to November 2007.⁴¹⁰
339. The Claimants point out that they have raised no claims and sought no damages for events prior to November 2007.⁴¹¹ Even the FSC recognized in August 2008 that the events to that point had not yet matured into a cognizable international investment dispute. The knowledge of “the events giving rise to” this investment dispute only came much later after the NTS and the FSC had engaged in the misconduct that forms the basis of the dispute.⁴¹²
340. The Respondent states that even accepting the Claimants’ trigger date of 21 November 2012, the facts show that the Claimants were aware before **21 November 2007** of the events giving rise to the disputes underlying many of their claims in this arbitration.⁴¹³
341. The Claimants rely on the opinion of former Judge [REDACTED] that, “in the context of Article 8(7), the use of the definite article ‘the’ in the phrase ‘the events giving rise to the

⁴⁰⁸ Counter-Memorial, paras. 711-715, referring to, *inter alia*, **Exhibit RA-024**, *Vieira v. Chile*, para. 249.

⁴⁰⁹ Counter-Memorial, para. 785 (The Respondent treats the NTS’s first determination to disregard Claimant Star Holdings as a “conduit” company in 2005 as an event that should have put the Claimants on notice that all future tax determinations would follow the same practice.).

⁴¹⁰ Counter-Memorial, paras. 782-783. The FSC stated in the summer of 2007 that the FSC would not approve any still-hypothetical sale of KEB by Lone Star until all “legal uncertainty” was resolved.

⁴¹¹ Reply, para. 1179 and n. 2169. The Claimants state they, for example, have “sought no damages arising from the SPO’s harassment and prosecutorial misconduct, despite the fact the SPO’s conduct was egregious enough to be actionable under investor-State precedent.” See **Exhibit CA-691**, *Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 1086 (finding that Kazakhstani authorities adopted a “string of measures of coordinated harassment by various institutions” that the tribunal “considered as a breach of the obligation to treat investors fairly and equitably”); **Exhibit RA-019**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 46 (alleging abusive prosecution and aggressive investigation tactics violated the investor’s due process and breached its rights under the BIT). Nor have Claimants sought to recover the massive litigation expenses that Respondent’s arbitrary and capricious conduct has caused them to incur over the years. Indeed, the dispute that Claimants have submitted in this case is narrowly tailored and highly conservative in nature, focusing on concrete, quantifiable losses on their investments.

⁴¹² Reply, paras. 1179-1180, referring to, *inter alia*, **Exhibit C-737**, FSC, Summary of Main Issues Regarding the Sale of KEB, August 2008, p. 16.

⁴¹³ Counter Memorial, paras. 782-791.

dispute' reflects the Parties' intent to refer to *all* such events, not just some of them."⁴¹⁴ At a minimum, they say, even if the limitation period could run before the investor had actual or constructive knowledge of **all** events, "the phrase must refer to all core or material events from which the dispute arose. Those events are the 'real cause' of the dispute"⁴¹⁵ and were not known to the Claimants prior to November 2007.

342. The Claimants complain that the Respondent wrongly reads Article 8(7) as granting it immunity from liability under the 2011 BIT, prospectively and in perpetuity, so long as its subsequent wrongful acts can be characterised as "falling within the scope of some earlier 'dispute,' broadly defined, with the investor"⁴¹⁶ thereby turning the purpose of a limitation period from prescription to enablement of future misconduct.
343. According to the Claimants, the Respondent's interpretation does not serve the goal of the fair and efficient resolution of disputes. Rather than encouraging a claimant to pursue fully realized disputes in a prompt and diligent manner, the Respondent's interpretation would force prospective claimants to launch arbitrations while a dispute is premature, unsettled and there may still be prospects for an amicable outcome.⁴¹⁷
344. In addition, the Respondent's interpretation runs directly contrary to the general principle that a limitations period runs from the moment the wrongful act or omission ceases to exist. This general discourages wrongdoers from continuing to commit wrongful acts by renewing the limitations period with each new breach or violation.⁴¹⁸ Here, the wrongful acts continued until the FSC's wrongful imposition of a share price reduction in the Hana transaction in November 2011. The wrongful harassment by the NTS continued beyond 2012.
345. More broadly, the Parties argue the issue as follows:

⁴¹⁴ Reply, para. 1184, citing Exhibit CWE-037, [REDACTED] First Expert Report, para. 24 [emphasis original].

⁴¹⁵ Reply, para. 1185.

⁴¹⁶ Reply, para. 1186.

⁴¹⁷ Reply, para. 1203.

⁴¹⁸ Reply, para. 1204.

- (a) the Claimants contend that Article 8(7) does not apply because application would impermissibly limit the Claimants' rights *under the 1976 BIT* (which, unlike the 2011 BIT, does not contain a limitation clause);⁴¹⁹
- (b) the Respondent replies that if, as the Claimants argue, the 2011 BIT is to be applied to claims based on acts or omissions that predated its entry into force, then its time limitation clause must be applied as well;⁴²⁰
- (c) according to the Claimants, the interpretation of Article 8(7), if it applies, is subjective, *i.e.*, it must be determined solely by reference to the Claimants' pleadings and to what the "[Claimants] consider to be the 'dispute' arising between them and [Korea];"⁴²¹
- (d) the Respondent contends the test is "objective;"
- (e) in any event, the Claimants state if the relevant dispute arises from a continuing act, the continuation of the act delays initiation of the limitation period, and the five-year period in Article 8(7) begins to run only once the continuous act has been completed.⁴²² The Claimants rely on the conclusion of the *UPS v. Canada* tribunal that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly."⁴²³

According to the Respondent, this argument is irrelevant as there are no "continuing courses of conduct" at issue.⁴²⁴

⁴¹⁹ Reply, para. 1157 and ns. 2140, 1207.

⁴²⁰ Rejoinder, para. 409.

⁴²¹ Reply, para. 1163, citing **Exhibit CA-333**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 235.

⁴²² Reply, para. 1189, citing **Exhibit CA-668**, J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems," in 66 *The British Yearbook of International Law* (1995), p. 431 ("The general principle is that a claim can only be inadmissible on the ground of lapse of time *once the breach has ceased to exist*, that being the earliest date from which any time limit can possibly start to run" [emphasis original].).

⁴²³ Reply, para. 1190, citing **Exhibit CA-297**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, 24 May 2007, para. 28.

⁴²⁴ Rejoinder, paras. 419-420.

The Tribunal's Ruling with Respect to the Article 8(7) Five-Year Limitation Period

346. In the Tribunal's view, the Article 8(7) limitation has no application to the present case because the Claimants have sufficiently alleged NTS and FSC misconduct post-dating 27 March 2011 on which to ground their principal claims. The debate about the appropriateness of the 21 November 2017 "cut-off" date is moot.
347. However, the rejection of the Article 8(7) defence does not in itself answer the Respondent's broader assertion that, all claims having "crystallised" prior to 27 March 2011, none is now actionable.

(8) Did the Alleged "Continuing Disputes" Crystallise Before 27 March 2011?

348. The Claimants, as previously described, characterise the events of 2003 to 2012 as constituting an overarching campaign by the Respondent to damage their investments and deny them the associated profits. It is for the Claimants, they say, to plead their case, and not to have the Respondent try to reframe the Claimants' case to the Respondent's tactical advantage.
349. The Respondent, on the other hand, disaggregates the "overarching campaign" (whose existence it denies) into individual events each with its own special factors. It is for the Tribunal to give shape to the narrative of events, not for the Claimants to dictate the result by the simple expedient of artful pleading.⁴²⁵
350. Applying the definition of a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests,"⁴²⁶ the Respondent insists that the views of the Parties became clearly defined prior to the entry into force of the 2011 BIT on 27 March 2011 in a way that brought into focus "[c]learly identified problems, capable of exposition in concrete

⁴²⁵ Rejoinder, para. 414.

⁴²⁶ Counter-Memorial, para. 701, citing **Exhibit CA-284, *Mavrommatis***, p. 11.

terms.”⁴²⁷ At that moment, the dispute “crystallised”⁴²⁸ and failed to survive the Treaty cut-off date.

351. The Respondent relies on the following circumstances:

- (a) in September 2007, the FSC **had publicly** announced its intention to withhold approval of HSBC’s application, pending resolution of the “serious legal uncertainty” then surrounding Lone Star’s acquisition of its KEB shares. The Claimants do not deny knowing of the FSC’s announcement;⁴²⁹
- (b) a February 2007 report by the U.S. Congressional Research Service to the U.S. Congress lists “the Lone Star” case as a “Major U.S. Trade Dispute[] with South Korea,” and discusses Lone Star’s complaint to the U.S. Government to the effect that criminal investigations into the circumstances of its KEB acquisition had “stalled” its proposed sale of KEB;⁴³⁰
- (c) throughout the summer of 2007, the FSC repeatedly stated it would not address any application for acquisition of KEB while legal uncertainty remained as a result of the Lone Star-related criminal prosecutions;⁴³¹ and

⁴²⁷ Counter-Memorial, paras. 714-715, citing, *inter alia*, **Exhibit RA-024**, *Vieira v. Chile*, para. 249. See also, Rejoinder, para. 382 and n. 760, referring to Reply, para. 890 (“Despite their contention that it is the claimant that has the prerogative of defining the relevant dispute between the parties, Claimants acknowledge that a dispute arises when ‘the Parties are ‘positively opposed’ to each other.’ ... Accordingly, this assertion implies a concession by the Claimants that there is an objective element to the determination of when a dispute arose.”).

⁴²⁸ Rejoinder, para. 382, citing, *inter alia*, **Exhibit RA-014**, *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, para. 48 (finding that a dispute “crystallize[s]” when “the parties assert clearly conflicting legal or factual claims bearing on their respective rights”). See also Counter-Memorial, paras. 711-713.

⁴²⁹ Rejoinder, para. 434. On 11 February 2009, LSF Chairman [REDACTED] wrote to the FSC acknowledging the existence of the KEB dispute dating back to at least 2006; see **Exhibit C-367**, Letter from [REDACTED] to D.S. Chin, 11 February 2009 (“[F]or more than three years now [*i.e.*, since 2006], Lone Star has attempted to sell its stake in KEB ... But at each turn, its efforts have been thwarted by the Korean government.”). Mr. [REDACTED] had also written to the same effect on 9 January 2008 (**Exhibit R-099**, Letter from [REDACTED] to K.W. Jun, 9 July 2008) and 8 August 2008 (**Exhibit R-001**, Letter from [REDACTED] to K.W. Jun, 8 August 2008).

⁴³⁰ Rejoinder, para. 434, referring to **Exhibit R-007**, Congressional Research Service, *Report for Congress, South Korea-U.S. Economic Relations*, Report No. RL30566, 12 February 2007, pp. 10-11.

⁴³¹ See, e.g., **Exhibit C-156**, “FSC put the brakes on Lone Star’s early sale plan of its interest in KEB,” *Money Today*, 26 June 2007 (“‘We are evaluating whether Lone Star was qualified to be KEB’s majority shareholder,’ [FSC official, Mr. Hyeok-Se] Gwon said, ‘If Lone Star sells its shares, we will make a decision on whether to approve such sale

- (d) the FSC's position on the processing of acquisition applications in the face of legal uncertainty is a primary component of Claimants' claims relating to the KEB sale. However, because they were aware of the FSC's position on that issue well before 21 November 2007, such claims are barred by the 2011 BIT's limitation clause.⁴³²

352. With respect to the tax disputes, the Respondent's position is that the Claimants first acquired knowledge of the relevant events no later than 2005, when Star Holdings filed its application for tax exemption on its sale of Star Tower Corporation and the NTS commenced its tax investigation.⁴³³ Moreover, in May 2005, the Claimants themselves formally acknowledged that a tax dispute existed, as illustrated by a lobbying report filed by Lone Star with U.S. government authorities, which referred to Lone Star's efforts to resolve its "tax dispute with the Government of Korea."⁴³⁴ The dispute related to "form over substance." The NTS viewed the Belgian entity as a conduit company and therefore not eligible for treaty benefits.⁴³⁵

353. In 2009, the Seoul Administrative Court first entertained the question of whether the NTS should have applied Article 13 of the Korea-Belgium Tax Treaty. At that point, the

comprehensively taking into account the majority shareholder qualification evaluation process and court's decision.").

⁴³² Rejoinder, para. 435.

⁴³³ Counter-Memorial, para. 739; **Exhibit RA-187**, Application for Non-Taxation or Tax Exemption of Corporate Income Tax by Star Holdings SCA, 10 January 2005.

⁴³⁴ Counter-Memorial, para. 742; **Exhibit R-054**, Lobbying Registration of Lone Star Fund III pursuant to Lobbying Disclosure Act of 1995, 13 May 2005.

⁴³⁵ Counter Memorial, para. 456; Witness Statement of Myung Jun Kim, 19 March 2014 ("**M.J. Kim First Witness Statement**"), paras. 19-21. The Respondent says all the tax issues are rooted in the same dispute that crystallised in 2005 including withholdings by Credit Suisse and Hana and the tax assessment against Citibank for LSF-KEB's dividend income from KEB. The sub-issues also include NTS's refusal to engage in the mutual agreement procedure, the 2005 dispute over the taxation of the partnerships rather than the ultimate investors, and the July 2008 income tax assessment against Lone Star's upstream entities. Finally, the ongoing Korean court proceedings over the initial dispute, as well as the reassessments pursuant to the 2009 judgment from the Seoul Administrative Court and ultimate affirmation by the Seoul High Court in 2010 and the Supreme Court in 2012. See Counter-Memorial, paras. 745, 747-752, 755-759; **Exhibit C-160**, Request on Behalf of Star Holdings to the Belgian Federal Public Service - Finance, 6 August 2007 (requesting initiation of a "mutual agreement procedure" under the Korea-Belgium Tax Treaty); **Exhibit C-165**, Letter from NTS to Belgian Administration of Corporate Tax and Income, 27 September 2007 (denying the mutual agreement procedure request); **Exhibit R-202**, Request for Information from SRTO to [REDACTED] 22 July 2005; **Exhibit R-203**, Answer to Request for Information from [REDACTED] to SRTO, 26 July 2005. See also Counter-Memorial, paras. 753-754; **Exhibit C-196**, Letter from J.S. Song to [REDACTED] 4 July 2008, p. 3 (attaching "Details of Tax Payables"); D.G. Hwang First Witness Statement, para. 46; **Exhibit C-212 / RA-270**, Administrative Court Judgment, February 2009; **Exhibit C-219**, Seoul High Court, Case No. 2009Nu8016, Judgment, 12 February 2010; **Exhibit C-288**, Supreme Court of Korea, Case No. 2010Du5950, Judgment, 27 January 2012.

Respondent contends, “the parties took positions positively and actively opposed to each other, with ‘clearly identified problems, capable of exposition in concrete terms.’” Thus, according to the Respondent, “all components of the Tax Theory Dispute crystallized as early as 2005 and no later than 2009.”⁴³⁶

The Tribunal’s Ruling with Respect to “Continuing Acts” and “Composite Acts”

354. The basic issue is to determine what is the “composite act” which has “acquired a different legal character” from its composite parts. In the Tribunal’s view, the Claimants have not identified a cluster of facts to which a post-2011 act of Korea brought into existence a separate and distinct treaty violation (an act of a “different legal character”). The only candidate for “composite act” is the allegation of systemic harassment, but in that regard the alleged post-2011 harassment simply added new and different episodes to the Claimants’ earlier grievances. The Claimants have not established a scheme of systemic harassment separate and distinct from a series of acts or omissions which they claim *individually* give rise to State liability.
355. In the Tribunal’s view, the post-2011 alleged misconduct was repetitive, not transformative. The “harassment” events as outlined by the Claimants amounted to a “series of repeated actions” and not, as discussed by Professor James Crawford, “a legal entity the whole of which represents more than the sum of its parts.”⁴³⁷
356. As to “continuing acts,” the Claimants have presented their difficulties with the Respondent’s regulations as a series of discrete transactions each with its own problems and players.
357. In the absence of proof of an overarching “harassment” charge, which the Tribunal rejects as a vast oversimplification of a complex factual and legal situation, the post-2011 Hana transaction and ongoing tax disputes stand on their own merit although, as stated, the Tribunal will take into account pre-2011 conduct not as actionable facts but insofar as it

⁴³⁶ Rejoinder, para. 398, quoting Exhibit RA-024, *Vieira v. Chile*, para. 249; Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009.

⁴³⁷ Exhibit CA-760, Crawford, *State Responsibility*, p. 266.

allegedly throws light on post-2011 conduct whose intent and purpose might otherwise be ambiguous.

358. Equally, the Tribunal does not accept the Respondent's argument that Mr. [REDACTED] pre-2011 letters absolved the Respondent from post-2011 misconduct because in the Respondent's view the legal disagreement between the investors and the State "crystallised" prior to the effective date of the 2011 BIT. As will be discussed, the 2011 Hana dispute differed in important respects from the earlier HSBC dispute, notably in respect of the alleged role of the FSC in imposing a share price reduction in order to protect itself in the heated 2011 political environment in preference to carrying out what the Claimants say was its statutory duty.
359. The Claimants also argue that the FSC unlawfully interfered with LSF-KEB's right to receive dividends as the shareholder of record for KEB's 2011 financial year and that the FSC, FSS and NTS coordinated pressure to force Hana to withhold tax in a manner inconsistent with its contractual obligations.⁴³⁸
360. The Claimants' allegations of separate and distinct post-March 2011 acts and omissions, if established, render untenable the Respondent's limitation argument based on its excessively broad characterization of the dispute that "crystallised" prior to the entry into force of the 2011 BIT. The Respondent's overgeneralization suffers from the same defect as the Claimants' argument about an overarching "scheme of harassment" between 2005 and 2011. In both cases, more specificity is required. The "crystallisation" argument does not serve in the present case to immunise the State from acts that constitute fresh and different treaty violations alleged to have taken place in the timeframe covered by the 2011 BIT.

(9) Do the Claimants Lack Standing under the ICSID Convention and the 2011 BIT to Assert the Tax-Related Claims?

361. The tax-related claims account for almost USD 1.5 billion of the total of almost USD 4.7 billion claimed in compensation. According to the Respondent, seven of the Claimants (all

⁴³⁸ Reply, para. 1147.

but LSF-KEB) lack standing because the tax assessments on which they predicate their claims were made against upstream entities, none of which are eligible for protection under the Korea-Belgium BIT.⁴³⁹ LSF-KEB, for its part, lacks standing because it seeks to recover in respect of taxes assessed on its upstream entities and for denial of a refund of withholding tax payments made by third parties (Credit Suisse, Citibank and Hana).

362. The Respondent's main points are: (1) that the Korea-Belgium BIT protects investors from *Belgium or Luxembourg*, not the upstream United States or Bermudan investors; (2) that the *Belgian or Luxembourg* investors must allege that they themselves suffered some injury; and (3) that the relevant injury must have been suffered by them *with respect to their investments in Korea*. In the Respondent's view, seven of the eight Claimants in this case cannot make these showings.⁴⁴⁰

363. More specifically, the Respondent's position is:

- (a) with respect to the ICSID Convention, the notion of a "legal dispute" necessarily implies a disagreement over legal rights, and therefore an allegation of violation by the other party of some legal right enjoyed by the claimant itself (not by some third party, even an upstream investor);⁴⁴¹
- (b) reference to breach "of an obligation under [the 2011 BIT]" in Article 8(1) necessarily implies an obligation of the host State under the BIT *with respect to an investment by the claimant* in that State;⁴⁴²
- (c) to establish standing, a claimant in the first instance must at least have identified and *alleged* some type of harm or injury to itself, rather than to third parties, which could be to a legal or other non-economic right;⁴⁴³

⁴³⁹ Counter-Memorial, paras. 621-653.

⁴⁴⁰ Rejoinder, para. 485.

⁴⁴¹ Rejoinder, para. 449.

⁴⁴² Counter-Memorial, para. 604; Rejoinder para. 448.

⁴⁴³ Counter-Memorial, paras. 604-605. The Respondent states that neither the ILC Articles nor the commentary thereon contradict or qualify the requirement, "amply confirmed in the investment jurisprudence, that a claimant must allege some negative impact on its investment (not an impact on third parties, or an impact on some hypothetical right

- (d) the harm alleged must necessarily be harm to an investment covered by the BIT;⁴⁴⁴
- (e) the investment must necessarily have been one made by the claimant itself;⁴⁴⁵
- (f) the Claimants effectively seek to bring a representative claim on behalf of parent entities that themselves lack the nationality required to claim under the 2011 BIT. The *Zhinvali v. Georgia* tribunal observed that it knew of “*no ICSID precedent* where one single party has successfully asserted claims not only on its own behalf but also on behalf of other non-party entities which were not implicated with a specific written agreement that constituted the ‘consent’ of the host Contracting State to such an assertion on their behalf;”⁴⁴⁶
- (g) none of the Claimants possessed investments in Korea at the time of Korea’s taxation of the upstream entities (which is the earliest time that Claimants’ alleged rights possibly could have suffered harm) because they had already divested themselves and exited the country;⁴⁴⁷ and
- (h) an indemnity payment as a result of a contractual commitment does not mean there has been an injury to LSF-KEB’s *investment* in Korea. LSF-KEB received payment of KEB dividends in full from 2008 to 2011.⁴⁴⁸

364. According to the Claimants, the refusal of the NTS to refund taxes withheld by Credit Suisse and Hana was a violation of the free transfer obligation⁴⁴⁹ and the refusal to refund the taxes withheld by Credit Suisse violated the BIT’s Fair and Equitable Treatment, Non-

unconnected to an investment) to claim under a BIT and the ICSID Convention. This remains true whether or not such impact caused economic damages” (Rejoinder, para. 460).

⁴⁴⁴ Counter-Memorial, para. 605.

⁴⁴⁵ Counter-Memorial, para. 605.

⁴⁴⁶ Counter-Memorial, para. 1082, citing **Exhibit RA-030**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (“*Zhinvali v. Georgia*”), para. 400 [emphasis added by the Respondent].

⁴⁴⁷ Counter-Memorial, para. 1084.

⁴⁴⁸ Rejoinder, para. 506; Witness Statement of Ik Nam Kim, 19 March 2014 (“**LN. Kim Witness Statement**”), para. 5.

⁴⁴⁹ Memorial, paras. 661-662. The Claimants describe the denial of refund requests in a single paragraph in the Request for Arbitration but therein make no allegation that the denials, in particular, violated the BIT (Request for Arbitration, para. 51).

Impairment, and Umbrella Clause obligations.⁴⁵⁰ Moreover, LSF-KEB has standing to assert a BIT claim based on the tax assessment against Citibank, because LSF-KEB indemnified Citibank Korea, “with its own funds,” pursuant to a contractual obligation to that bank.⁴⁵¹ In addition,

- (a) there is no requirement to allege harm. The Claimants note that other BITs entered into by Korea (such as its BIT with Japan) make explicit reference to a harm requirement.⁴⁵² They conclude from this that the absence of such a provision in the 2011 BIT signifies the absence of any harm requirement in the 2011 BIT;⁴⁵³
- (b) the tax assessments on the upstream entities “provide a convenient metric for quantifying the *value* of Claimants’ intangible rights to preferential tax treatment;”⁴⁵⁴ and
- (c) the tax assessments of the upstream Lone Star entities are a “consequence of the breach of Claimants’ [Tax Treaty] rights.” The Claimants have standing to recover damages equal to the amount of taxes NTS assessed on those upstream entities⁴⁵⁵ because it was “precisely that conduct,” the non-taxation of the Claimants, that breached the BIT.⁴⁵⁶ The Respondent dismisses this as an alleged “right to be taxed.”⁴⁵⁷

The Tribunal’s Ruling Regarding Status to Bring Tax Claims

365. **In the view of the Tribunal majority**, the Respondent’s objection to standing is not fatal to the tax claims for two reasons.

⁴⁵⁰ According to the Respondent, the “sudden appearance of these additional claims evidences the Claimants’ need to shift their legal theory in order to remedy their lack of standing to assert their original taxation claims” (Rejoinder, para. 490 and n. 982).

⁴⁵¹ Reply, paras. 954, 981.

⁴⁵² Reply, paras. 909-910.

⁴⁵³ Reply, para. 911.

⁴⁵⁴ Reply, para. 945 [emphasis original].

⁴⁵⁵ Reply, paras. 944-945.

⁴⁵⁶ Reply, para. 924.

⁴⁵⁷ Rejoinder, para. 453.

a. With Respect to the Upstream Investors

366. Apart from LSF-KEB, none of the Claimants were taxed. It is true they have no status to bring representative claims on behalf of upstream entities none of which are protected investors under the 2011 BIT. However, that is not the end of the matter. As noted above, the application of the “Substance Over Form” principle did not change the legal relationships, only the tax situation. The **legal** owners have standing to bring the claim even though their upstream owners have no status to do so. The majority of the Tribunal is not prepared to assume, for purposes of standing, that the Respondent correctly taxed upstream investors instead of the Belgian investment companies. To do so would be to assume in favour of the Respondent an important point in issue, namely whether the Respondent adopted the correct tax treatment.

b. With Respect to LSF-KEB

367. As stated, LSF-KEB’s claims include not only tax assessments on behalf of its upstream investors but also claims in its own right for wrongful withholding by third parties under NTS pressure⁴⁵⁸ including (1) a claim under Korean law to receive refunds for taxes that Credit Suisse withheld and then paid over to NTS in 2007;⁴⁵⁹ (2) a claim under Korean law to receive refunds for taxes that Hana Bank withheld and then (it says wrongly) paid over to NTS in 2012;⁴⁶⁰ and (3) a claim in respect of LSF-KEB’s indemnification of Citibank for taxes and tax penalties that NTS assessed on Citibank. Citibank was obliged to pay these sums to NTS, and LSF-KEB was contractually obligated to reimburse Citibank. This claim arose out of Citibank’s earlier “failure” to withhold a sufficiently high amount of withholding taxes from KEB’s dividend payments to LSF-KEB between 2008 and 2011.⁴⁶¹

368. Credit Suisse and Hana Bank paid taxes exclusively as agents for LSF-KEB.⁴⁶² The relevant funds were owned by LSF-KEB. They constitute part of LSF-KEB’s return on its

⁴⁵⁸ Memorial, paras. 364 *et seq.* (asserting claims for withholding by third parties), and para. 380 (asserting claims for “taxes on Lone Star’s capital-pooling entities”).

⁴⁵⁹ Reply, paras. 956-957.

⁴⁶⁰ Reply, paras. 958-959.

⁴⁶¹ Reply, para. 974. *See also* Rejoinder, para. 488.

⁴⁶² Reply, paras. 956, 958.

investment in Korea.⁴⁶³ The Seoul Administrative Court⁴⁶⁴ determined that LSF-KEB has standing under Korean law to claim a refund of the funds retained by NTS.⁴⁶⁵

369. These claims are opposed by the Respondent because it was only subsequent to 2012, once LSF-KEB had already fully extricated itself from its investment in KEB, that the NTS imposed an additional assessment on Citibank Korea for its failure to withhold taxes at what the NTS considered to be the correct rate.⁴⁶⁶ At the time, LSF-KEB was no longer an investor with an investment in Korea.

370. While LSF-KEB received KEB dividends through Citibank, the funds were impressed with an indemnity obligation to Citibank to hold Citibank harmless in the event it was out of pocket as a result.⁴⁶⁷ Both the right to the dividends and the obligation to hold harmless

⁴⁶³ Reply, para. 970. See also Rejoinder, para. 491.

⁴⁶⁴ The Respondent argues that even if the Seoul Administrative Court had found LSF-KEB to be the substantive owner of the funds, the decision of the Korean courts is not binding on this Tribunal, which retains discretion to evaluate the weight to accord the Seoul Administrative Court decision (Rejoinder, para. 492, n. 990, referring to Exhibit CA-706, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 ("*Inceysa v. El Salvador*"), paras. 234, 236, 245-252, 257).

⁴⁶⁵ Reply, para. 968; Exhibit C-699, Seoul Administrative Court, Case No. 2010Guhap38684, Judgment, 13 June 2014, p. 5. See also Rejoinder, para. 491. In a 13 June 2014 decision, the Seoul Administrative Court had affirmed that the ultimate investors were the substantive owners of the withheld funds. Two other Korean courts have determined that LSF-KEB would have standing, under Korean law, to claim a refund, on the basis that LSF-KEB can be deemed the "income owner" of those retained funds. (Reply, paras. 967-968, citing Exhibit C-699, Seoul Administrative Court, Case No. 2010Guhap38684, Judgment, pp. 5-6 (declaring LSF-KEB the "income owner" of the withheld funds, but finding that "the ultimate investors who invested in the upper-level investors must be considered the substantive owners.")). The Respondent says that the 13 June 2014 ruling does not "automatically" give rise to standing under the BIT and the ICSID Convention because LSF-KEB cannot show that the refund denial had an adverse effect on LSF-KEB's investment in Korea because the substantive owners of the relevant retained funds are LSF-KEB's upstream entities, rather than LSF-KEB itself. Any refund denial therefore does not in any way affect LSF-KEB's own investment in Korea (Rejoinder, paras. 493-494).

⁴⁶⁶ Rejoinder, paras. 505-506.

⁴⁶⁷ See Exhibit C-758, Direct Custodian Services Agreement Between LSF-KEB Holdings SCA and Citibank, N.A., 22 May 2006. Aside from LSF-KEB Holdings SCA's duty to indemnify (Art. 14) and LSF-KEB Holdings SCA's right to subrogate claims found (Art. 13), Art. 17(B) states in its relevant part:

The Client shall remain liable for any deficiency. If any Taxes shall become payable with respect to any payment made to the Client by the Custodian or its agents in a prior year, the Custodian and its agents may withhold Payments and/or other cash from the Cash Account in satisfaction of such prior year's Taxes.

See also Exhibit CWE-024, Second Witness Statement of [REDACTED] 1 October 2014 ("[REDACTED] Second Witness Statement"), para. 63:

I recall that LSF-KEB provided or authorized CKI [Citibank Korea] to provide various documents to the NTS, including the Direct Custodian Services Agreement between LSF-KEB Holdings SCA and Citibank. That agreement

Citibank were linked to the Claimants' investment. The fact that the Claimants were able to exit Korea before their tax issues were resolved does not detract from the investment linkage and thus to their standing to bring a claim under the 2011 BIT.

371. Accordingly, the Respondent's objection to the Claimants' status to bring the tax claims is dismissed by majority.

F. CONCLUSION ON JURISDICTION

372. Having determined that:

- (a) under the ICSID Convention and the 2011 BIT the Tribunal has, in addition to temporal jurisdiction [*ratione temporis*], both subject matter jurisdiction [*ratione materiae*] over the investment claims and the post 27 March 2011 tax claims as well as personal jurisdiction [*ratione personae*] over those Claimants who are seeking compensation for the alleged violations of the 2011 BIT;
- (b) the Tribunal has no jurisdiction under the Korea-Belgium Tax Treaty;
- (c) the Claimants' investments were not (and are not) protected under the 1976 BIT;
- (d) acts or omissions prior to 27 March 2011 are not actionable under the 2011 BIT;
- (e) the Claimants have not established a "composite act" or a "continuing act" to make relevant their pre-2011 allegations of misconduct (except as background to assist in the interpretation of post-2011 events);
- (f) the LSF-KEB investment in KEB has satisfied the requirements for protection under both the 2011 BIT and the ICSID Convention;

and having determined by majority that:

included a clause that indemnified CKI as custodian from any future tax contingencies that may arise with respect to income paid to LSF-KEB on those shares. In my experience, such clauses are standard industry practice.

- (g) the Claimants have standing, insofar as they are the legal owners of the taxed investments, to assert claims that otherwise fall within the scope of the 2011 BIT;

the Tribunal will therefore address the surviving claims as follows:

- (i) the allegation of wrongful interference by the FSC in the sale of KEB shares to Hana and in particular the orchestration of a share price reduction;
- (ii) KEB-LSF's claim with respect to the 2011 mid-year and year-end dividends, and
- (iii) the various post-2011 tax disputes including in particular the Star Tower reassessment of 13 February 2012,⁴⁶⁸ the 5 March 2012 withholding tax on the proceeds from the sale of its equity stake in KEB to Hana Bank⁴⁶⁹ and the 11 March 2013 retroactive assessment against Citibank in respect of taxes on KEB dividends paid to LSF-KEB between 2008 and 2011.⁴⁷⁰

VI. ARE THE CLAIMANTS ESTOPPED FROM CONTESTING THAT LONE STAR'S CONDUCT WAS WRONGFUL AND ILLEGAL?

373. The Respondent argues in its Rejoinder that the Claimants are estopped from challenging certain adverse findings in respect of their involvement with the KEBCS Transaction.⁴⁷¹ In the *Olympus Capital* ICC arbitration, it was determined that Lone Star's conduct in relation to Olympus Capital's investment was wrongful and in breach of Korean law.⁴⁷² In the Stock Price Manipulation Case, the Korean courts found that the Lone Star appointed directors on the KEB Board, particularly Messrs. [REDACTED] [REDACTED] [REDACTED]

⁴⁶⁸ Exhibit C-359, Tax (Re-)Assessment Notice to Lone Star Fund III (U.S.) L.P. Concerning the Star Tower Sale, 13 February 2012; Exhibit C-358, Tax (Re-)Assessment Notice to Lone Star Fund III (Bermuda) L.P. Concerning the Star Tower Sale, 13 February 2012.

⁴⁶⁹ Exhibit C-361, Letter from SRTO to Hana, 18 January 2012.

⁴⁷⁰ Exhibit C-144, Tax Assessment Notice to Citibank Korea Concerning Withholding on Dividends (2008–2011), 11 March 2013.

⁴⁷¹ Rejoinder, paras. 538 *et seq.*, citing, *inter alia*, Exhibit RA-314, Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010 ("*RSM v. Grenada*"), paras. 7.1.1-7.2.1; Exhibit RA-315, Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 10 May 1988, para. 30 ("[A] right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed") [emphasis original]. See also Exhibit RA-316, Southern Pacific Railroad Company v. United States of America, 168 U.S. 1, 18 October 1897 ("*Southern Pacific v. United States*"), p. 12.

⁴⁷² Exhibit R-365, *Olympus Capital*.

█ and █ had orchestrated a scheme to manipulate the KEB Card share price to reap a USD 64 million profit at the expense of Olympus Capital. The Respondent argues that issue estoppel (or claims preclusion) is “well established as a general principle of law applicable in the international courts and tribunals,”⁴⁷³ citing *RSM v. Grenada* for the principle that:

[A] finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.⁴⁷⁴

374. The Respondent also relies on *Helnan v. Egypt*, where the tribunal stated:

*An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.*⁴⁷⁵ [emphasis added by this Tribunal]

375. The Respondent was not a party to the *Olympus Capital* ICC arbitration where Lone Star was held at fault, nor was the Respondent a party to the ICC Arbitration involving Hana Financial where Korea was found at fault *in absentia*.⁴⁷⁶ For its issue preclusion argument, the Respondent relies upon the decision of the United States Supreme Court in *Southern Pacific v. United States*:

The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be

⁴⁷³ Rejoinder, para. 540, citing Exhibit RA-314, *RSM v. Grenada*, para. 7.1.2.

⁴⁷⁴ Rejoinder, para. 540, citing Exhibit RA-314, *RSM v. Grenada*, para. 7.1.1.

⁴⁷⁵ Rejoinder, para. 544 and n. 1075, citing Exhibit RA-317, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 (“*Helnan v. Egypt*”), para. 106; see also para. 125 (“[A]n international tribunal must accept the *res judicata* effect of a decision made by a national court within the legal order where it belongs.”); Exhibit RA-314, *RSM v. Grenada*, para. 7.1.11 (“BIT tribunals do not reopen the municipal law decisions of competent *fora*, absent a denial of justice.”).

⁴⁷⁶ Exhibit C-949, *LSF-KEB Holdings SCA v. Hana Financial Group, Inc.*, ICC Case No. 22221/CYK/PTA, Final Award, 13 May 2019 (Chair: Prof. Z. Douglas, G. Born, T. Landau QC) (“*ICC Award*”).

*taken as conclusively established, so long as the judgment in the first suit remains unmodified.*⁴⁷⁷ [emphasis added by this Tribunal]

376. The Respondent also refers to the award in *Apotex v. United States*, where the tribunal noted that a triple identity test (requiring the identity of *personae*, *petitum* and *causa petendi*) has often been considered a requirement for estoppel to operate. However, the *Apotex* tribunal also observed that some tribunals have adopted a “simpler analysis,” but the simpler analysis still required identity of the parties and of the issue to which preclusion was sought to be applied.⁴⁷⁸
377. Nevertheless, seeking to apply the doctrine of estoppel to this case, the Respondent says the Claimants cannot reargue binding conclusions from the *Olympus Capital* ICC arbitration and the Stock Price Manipulation Case because: (1) Claimant LSF-KEB was a party to those prior proceedings; (2) the matters that the Claimants now attempt to re-litigate were distinctly put in issue, were necessary to resolving the claims, and were finally decided in the *Olympus Capital* ICC arbitration and Stock Price Manipulation Case; and (3) the Claimants have not asserted any procedural or substantive impropriety in connection with either the Stock Price Manipulation Case or the *Olympus Capital* ICC

⁴⁷⁷ Rejoinder, para. 541, n. 1069, citing, *inter alia*, **Exhibit RA-316**, *Southern Pacific v. United States*, p. 12.

⁴⁷⁸ Rejoinder, paras. 547-548, citing **Exhibit RA-283**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (“*Apotex v. United States*”), paras. 7.9, 7.11, 7.13-7.19, 7.23, 7.37-7.40, 7.48-7.49, 7.54, 7.56, 7.64-7.65. The Respondent contends that the cases cited by the Claimants “do not address issue estoppel; rather, the cited cases consider questions of *claim* preclusion, which is a different doctrine that is subject to different rules. In each of Claimants’ cases, one party argued that the tribunal lacked jurisdiction under a BIT to hear a *BIT claim* because that claim had already been decided in a local court proceeding. That is not what Korea is arguing here” (Rejoinder, para. 549 [emphasis original]).

See further Rejoinder, paras. 550-552 and n. 1095, citing, *inter alia*, **Exhibit CA-765**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1130; **Exhibit CA-065**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (“*Paushok v. Mongolia*”), paras. 622, 624; **Exhibit CA-261**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (“*Burlington v. Ecuador*”), paras. 187, 410. (The Respondent states that the “Claimants also rely on *Burlington v. Ecuador*, where the majority of the tribunal, despite finding that it was not ‘bound’ by national courts’ decisions, stated that ‘it must pay due regard to earlier decisions of international courts and tribunals [and] subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.’ The *Burlington* tribunal also stated that ‘international tribunals should certainly consider decisions rendered by national courts.’”).

arbitration that could call into question the reliability of the decisions in those proceedings.⁴⁷⁹

The Tribunal's Ruling on Estoppel

378. The Respondent is not consistent in its approach. For example, the Respondent argues that even if the Seoul Administrative Court had found LSF-KEB to be the substantive owner of the funds in the tax litigation, the decision of the Korean courts is not binding on this Tribunal, which retains discretion to evaluate the weight to make its own evaluation of the proceedings and issues.⁴⁸⁰
379. The application of the equitable doctrine of estoppel, being an equitable doctrine, is context and fact specific. The Respondent presents the sub-doctrine of issue preclusion too broadly. If, for example, an employer chooses not to defend a minor regulatory prosecution relating to factory safety procedures because of labour-management concerns or the expense involved, it might be inequitable to allow third parties to raise the resulting conviction to preclude any defence in a major class action. However, while the Tribunal is not bound by the findings of another arbitral tribunal, especially where the parties were different, or the conclusion of the Korean criminal courts, those decisions have been admitted into the record and the Tribunal is certainly entitled to have regard to them for whatever insights are thought to be helpful after considering evidence and the submissions of the Parties in **this** case.
380. With respect to the Stock Price Manipulation conviction, the relevant legislation refers to conviction of a "serious financial crime," and the existence of a conviction is an issue of fact not argument. The Claimants have been given ample opportunity to contest the findings in these other proceedings (the fact of conviction was not contested) and they have done so at considerable length in respect of certain aspects and the Tribunal will deal with their arguments on the merits.

⁴⁷⁹ Rejoinder, para. 553.

⁴⁸⁰ Rejoinder, paras. 491-492 and n. 990, referring to, *inter alia*, *Inceysa v. El Salvador*, paras. 234-237. As well, of course, the Respondent disputes the finding (implicit if not explicit) of fault against the FSC by the ICC tribunal in the ICC Arbitration case of *Lone Star v. Hana*.

381. In the result, the Tribunal declines to apply estoppel.

VII. LONE STAR'S POST-2011 TAX CLAIMS

382. According to the Claimants, the refusal of the Respondent to accord the Claimants the benefits to which they were entitled under the Korea-Belgium Tax Treaty was arbitrary⁴⁸¹ and therefore constitutes denial of protection under the BIT. The NTS unreasonably assessed taxes with respect to the Claimants' investments on the basis of inconsistent, tax-maximizing rationales.⁴⁸² The Claimants also assert that the treatment was "discriminatory because Respondent's particular tax theories were applied only to Claimants and not to other entities that met the criteria that Respondent was purporting to apply."⁴⁸³

383. In addition to alleging a violation of 2011 BIT Article 2(3) prohibiting **Arbitrary and Discriminatory Measures**, the Claimants also submit that the Respondent failed to provide **Fair and Equitable Treatment** as required by the BIT by (i) frustrating the Claimants' legitimate, investment-backed expectations; (ii) acting in bad faith; (iii) impairing by arbitrary or discriminatory measures and (iv) failing to provide due process, procedural propriety, and freedom from coercion and harassment.⁴⁸⁴

384. In addition, the Respondent violated its obligation to provide **Full Protection and Security** by withholding the benefits that should have been afforded by the Tax Treaty.⁴⁸⁵

385. The adverse tax treatment breached the **National Treatment** and **Most-Favoured Nation** treatment obligations by treating Lone Star less favourably than Korean investors and investors of third countries⁴⁸⁶ and violated the Respondent's obligation under the **Umbrella Clause** by disrespecting its written obligations under the Korea-Belgium Tax Treaty.⁴⁸⁷ All of which amounts, as well, to **expropriation** by interfering with the

⁴⁸¹ See Reply, para. 1263, referring to **Exhibit CA-062**, C. Schreuer, "Chapter 10: Protection against Arbitrary or Discriminatory Measures," in C. Rogers and R. Alford, *The Future of Investment Arbitration* (Oxford University Press: 2009), p. 188.

⁴⁸² Reply, para. 1276.

⁴⁸³ Reply, para. 1291.

⁴⁸⁴ See Memorial, Sec. V.B; Reply, paras. 1308, 1318.

⁴⁸⁵ Reply, para. 1400.

⁴⁸⁶ Memorial, Sec. IV.D; Reply, para. 1402.

⁴⁸⁷ Reply, para. 1459.

Claimants' enjoyment of their Tax Treaty rights to such an extent as to have effectively deprived the Claimants of the value of those rights.⁴⁸⁸

386. Also, the imposition of the unlawful capital gains taxes on the sales of the Claimants' investments, prevented the **free transfer**⁴⁸⁹ of the full amount of Claimants' returns by (i) unlawfully compelling Hana to withhold tax on the proceeds of LSF-KEB's sale of KEB, effectively impounding a significant portion of those proceeds in Korea; and (ii) failing to release the withholding taxes that Credit Suisse voluntarily, but wrongfully, withheld on LSF-KEB's block sale of KEB shares.⁴⁹⁰
387. The Respondent in its Rejoinder points out that the Claimants have made use of the "Korean judiciary system to challenge every single tax assessment relating to this arbitration."⁴⁹¹ Yet, as counsel for the Claimants acknowledges, the "Claimants have not asserted a denial of justice claim against Korea's courts in this case at this time."⁴⁹² In the Respondent's view, the decision of Lone Star to take all of its tax issues to the Korean

⁴⁸⁸ Reply, para. 1450.

⁴⁸⁹ Reply, para. 1481.

⁴⁹⁰ Memorial, Sec. V.G.

⁴⁹¹ Rejoinder, para. 1195.

⁴⁹² TD23, 416:4-417:8 and 417:15-18:

Claimants have not asserted a denial-of-justice claim against Korea's courts in this case and at this time. Now, that said, it should be clear to everyone that the Korean courts' record is questionable – mixed at best – and I'll just mention one example. We maintain that there is every reason to be deeply suspicious of the timing of the Supreme Court's sudden and unexpected reversal of the KEB Card acquittal in March of 2011. You'll recall that the Appellate Court, that is the Seoul High Court, overturned the first instance guilty verdict in June of 2008, and acquitted all of the defendants. Unable to let the case go, however, the Prosecutors appealed that acquittal to the Supreme Court in 2008, and the appeal remained pending with the Korean Supreme Court for almost three years.

In March of 2011, the FSC was about to approve Hana as a purchaser for Lone Star's KEB shares which would finally allow Lone Star to exit Korea, and somehow literally just days after the FSC's intentions became public, the Supreme Court suddenly sprang to life. It announced that it was about to rule on the appeal, and then it reversed and remanded the High Court's acquittal sparking nearly another year of FSC paralysis. I submit that one would have to be awfully naïve to see that as a mere coincidence given the political storms surrounding these issues in Korea.

* * * * *

And so to be clear, Lone Star's decision not to press denial-of-justice claims, at least in this arbitration, is not an endorsement of the Korean courts.

courts, which decided each of Lone Star's issues, sometimes in Lone Star's favour, sometimes against, coupled with the absence of a denial of justice claim, is fatal to LSF-KEB's tax claims. Moreover, the Respondent's position is that:

*Seven of the eight Claimants in this case, all except for LSF-KEB, remarkably are complaining in this Arbitration that they were not taxed by Korea, so this is a rather unusual scenario: Entities insisting they should be taxed and then even going so far as to file a treaty claim because they were not taxed. Claimants did that here simply because certain upstream entities in the Lone Star family had been taxed instead of them, and those entities were unhappy about it.*⁴⁹³

388. Finally, the Respondent contends that:

- (a) to the extent the Tribunal has jurisdiction over any of LSF-KEB's tax-related claims, its exercise of such jurisdiction is limited to evaluating whether the refusal of the NTS to refund withholding taxes collected by Credit Suisse⁴⁹⁴ violated Korea's free transfer obligations under the 2011 BIT because the claims relating to other tax refunds were not asserted at any time prior to the Claimants' Reply;⁴⁹⁵ and
- (b) in any event, LSF-KEB's refund-related BIT claim concerning the Hana withholding taxes is independently barred by Article 8(3) of the 2011 BIT, which conditions a claimant's right to arbitration under the BIT on waiver of local remedies.⁴⁹⁶

⁴⁹³ TD22, 24:6-15.

⁴⁹⁴ Rejoinder, para. 490.

⁴⁹⁵ Rejoinder, para. 489.

⁴⁹⁶ Rejoinder, para. 497, citing **Exhibit C-001**, 2011 BIT Art. 8(3), which provides:

3. *If the dispute cannot be settled within six (6) months from the date on which the dispute has been raised by either party, and if the investor waives the rights to initiate any proceedings under paragraph 2 of this Article with respect to the same dispute, the dispute shall be submitted upon request of the investor of the Contracting Party:*

(a) to the International Centre for Settlement of Investment Disputes (ICSID) established by the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States [...].

A. KOREA-BELGIUM TAX TREATY

389. The Respondent has not consented to the arbitration of the Claimants' allegations of breaches of the Tax Treaty by this Tribunal. However, the Claimants make parallel allegations, based on the same facts and legal principles, that the tax treatment they received at the hands of the Respondent violated Article 10(3) of the BIT (the Umbrella Clause). The tax assessments in issue involve dividends from, and capital gains from the sale of the shares in four Korean companies, each owned by Belgian affiliates of Lone Star using essentially identical "tax efficient" structures. The NTS refused to acknowledge them as the substantive (as distinguished from the "formal") owners of the investment income and, in the result, denied them the benefits of the Korea-Belgium Tax Treaty⁴⁹⁷ by (according to the Claimants) (i) wrongfully characterizing Belgium as a tax haven, (ii) treating the Claimants as mere conduits for the "true" investors, none of which were of Belgian nationality, (iii) disregarding corporate structures and decades of practice, and (iv) applying inconsistent and mutually exclusive theories to identical factual situations.⁴⁹⁸

B. BACKGROUND TO THE SUBSTANCE OVER FORM PRINCIPLE

390. A central issue in the tax litigation brought by Lone Star is whether Korea's "Substance Over Form" doctrine is compliant with the Korea-Belgium Tax Treaty or, if it is, whether it has been applied in conformity with the BIT.

391. Korea did not adopt the Substance Over Form doctrine for the first time in relation to the Lone Star situation. Adoption had long preceded Lone Star's tax problems.

392. In 1967, the Supreme Court of Korea adopted, at least for domestic purposes, the Substance Over Form doctrine.⁴⁹⁹ This doctrine was then included in Article 14 of Korea's *Framework Act on National Taxes* ("FANT") of 1974 updating Korea's income tax

⁴⁹⁷ Exhibit CA-264, Korea-Belgium Tax Treaty.

⁴⁹⁸ Memorial, para. 333.

⁴⁹⁹ Exhibit RA-203, Supreme Court of Korea, Case No. 65Ni91, Judgment, 2 July 1967 ("On this basis, it is proper for Defendant to impose the sales tax and income tax in question both on Plaintiff and the non-party person (whose name is omitted) in accordance with the substance-over-form principle, no matter in whose name the business was conducted for form's sake.").

legislation.⁵⁰⁰ Between 1990 and 2002, the Korean Supreme Court in a series of cases developed the Substance Over Form doctrine as follows:

- (a) “[p]arties to an agreement should be determined not simply in reliance upon names on paper but in full consideration of the substance of the agreement, including the intentions of the parties and the actual source of funds used to pay the purchase price, in compliance with the substance-over-form principle;”⁵⁰¹
- (b) “[t]he transaction was deemed as a ‘disguised act’ intended by the seller to avoid heavy capital gains tax;”⁵⁰²
- (c) “facts based on which the applicable tax law is chosen should be determined on the basis of the substance of the relevant transaction, notwithstanding records and accounts kept by the relevant company or names used in such transaction;”⁵⁰³
- (d) sham transactions are an exception to the interpretive principle of strict construction, which is normally used when interpreting tax provisions;⁵⁰⁴
- (e) “[t]he substance-over-form provisions of Article 14 of the [FANT] are intended to impose the tax obligation not on the nominal owner of income but on the substantive owner of income. The ownership of income should therefore not be determined based on names used in operation or legal relationship, but on the ownership of profits arising out of substantial business activities.”⁵⁰⁵

393. In 2007, the text of Article 14(3) was updated to reflect Substance Over Form case law that authorised re-attribution of income where an indirect transaction using a third party was used to avoid taxes.⁵⁰⁶

⁵⁰⁰ Expert Report of [REDACTED] 20 March 2014 (“[REDACTED] First Expert Report”), para. 101.

⁵⁰¹ Exhibit RA-204, Supreme Court of Korea, Case No. 90Nu1663, Judgment, 12 October 1990.

⁵⁰² Exhibit RA-205, Supreme Court of Korea, Case No. 91Nu7170, Judgment, 13 December 1991.

⁵⁰³ Exhibit RA-206, Supreme Court of Korea, Case No. 90Nu10384, Judgment, 27 July 1993.

⁵⁰⁴ Exhibit CWE-012, Expert Report of [REDACTED] 8 October 2013 (“[REDACTED] First Expert Report”), para. 98, referring to Exhibit CA-III, Supreme Court of Korea, Case No. 92Nu18603, Judgment, 22 February 1994.

⁵⁰⁵ Exhibit RA-207, Supreme Court of Korean, Case No. 99Do2165, Judgment, 9 April 2002.

⁵⁰⁶ [REDACTED] First Expert Report, para. 102.

394. In 2012, Korea's Supreme Court ruled in a case unrelated to Lone Star that "even if transactions in [a] tax dispute are effective in terms of contract law, they may nevertheless be ignored or reconstructed for tax purpose[s] if they were designed to unfairly avoid taxes."⁵⁰⁷
395. A 2005 case from Korea's Tax Tribunal illustrates the application of the Substance Over Form doctrine in the context of a [redacted] Tax Treaty:

*B. "Beneficial Owner of Interest Income" stipulated in Article 11(1) of [redacted] Tax Treaty and Article 11(1) of [redacted] Tax Treaty means its substantive owner regardless of the form of such ownership. Therefore, where domestically sourced interest income is paid to a non-resident, and in the event of inconsistency between nominal and substantive owners of income, the substantive owner should be considered as the beneficial owner, and consequently, the tax treaty signed by the residence country of such substantive owner shall apply. Based on this, if a non-resident who effectively and substantially owns interest income receives interest income through an agent in a different country in order to enjoy the benefit of the limited tax rate under a tax treaty, the applicable tax treaty is the tax treaty signed by a country in which the substantive owner of interest income resides, not the tax treaty with the country where the agent resides.*⁵⁰⁸ [emphasis added]

(1) In 2002, the Korean Supreme Court Applied the Substance Over Form Principle in the Context of the Korea-Belgium Tax Treaty

396. Apart from Lone Star's litigation, the Korean Supreme Court has examined the Korea-Belgium Tax Treaty on facts comparable to those of Lone Star's Star Tower tax case, using a two-part test formulated as follows:

*In general terms, the Supreme Court cases establish two requirements for applying substance-over-form to prevent tax avoiding by disregarding a legal entity: 1) whether the interposed intermediary was established for tax avoidance without economic benefit, and 2) whether the interposed intermediary had [a] business purpose and engaged in business activities.*⁵⁰⁹

⁵⁰⁷ Exhibit CWE-012, [redacted] First Expert Report, para. 98, referring to Exhibit CA-118 / RA-378, Supreme Court of Korea, Case No. 2008Du8499, Judgment, 19 January 2012.

⁵⁰⁸ Exhibit RA-211, National Tax Tribunal, Case No. *Kuksim*2004Seo4421, Judgment, 13 July 2005.

⁵⁰⁹ Exhibit CWE-012, Professor [redacted] First Expert Report, para. 99, citing Exhibit CA-119 / RA-376, Supreme Court of Korea, Case No. 2010Du15179, Judgment, 26 April 2012.

397. The 2012 Korean Supreme Court case that developed this two-part analysis involved a Belgian investor called LaSalle. As in the case of Lone Star, LaSalle had bought an office tower in Seoul. When LaSalle sold the building in 2004, it paid no capital gains taxes in Korea, citing Article 13(3) of the Korea-Belgium Tax Treaty. In 2006, the NTS argued that LaSalle owed taxes on the capital gains because the Belgian entities were not the substantive beneficiaries. Korea's Supreme Court ultimately agreed with the NTS on the application of the Substance Over Form principle and established the two-part test above.⁵¹⁰ As in the present case, the Supreme Court decided that taxation of the upstream entities was appropriate.

(2) The Claimants Contend that Application of the Substance Over Form Principle Violates Korea's Treaty Obligations

398. As a threshold matter, the Claimants argue that application of the Substance Over Form rule is itself a violation of Article 13 of the Korea-Belgium Tax Treaty even though, as pointed out by counsel for the Respondent during the 15 October 2020 oral hearing, the

Claimants' own tax expert, ██████ confirmed in his witness testimony that he agrees that the widely held view that the "substance over form" rule is consistent with Tax Treaties. When asked on Day 14 of this Hearing whether the "substance over form" principle can apply in the

⁵¹⁰ Exhibit CA-119 / RA-376, Supreme Court of Korea, Case No. 2010Du15179, Judgment, 26 April 2012 (the nature and complexity of this series of transactions has been simplified); see also Exhibit CA-639 / RA-213, Supreme Court, of Korea, Case No. 2010Du11948, Judgment, 26 April 2012; Exhibit R-192, Seoul Administrative Court, Case No. 2008Guhap16889, Judgment, 26 June 2009.

The two LaSalle limited partnerships were British, but like Lone Star set up Belgian SCAs and Luxembourg-based S.à.r.l.s. Just as Lone Star had acquired C&J Trading Co., LaSalle's Belgian SCAs acquired a limited liability company named Northgate, which specialised in asset-backed securitization. Through Northgate, the Belgian entities purchased an office tower in Seoul, which they later disposed of through a sale of shares to the British insurer Prudential Assurance Company Ltd. Prudential did not withhold capital gains in the transaction because the seller was based in Belgium, and cited Article 13 of the Korea-Belgium Tax Treaty claiming it would be double taxation. The NTS levied taxes on capital gains against LaSalle's upstream British entities on the basis of the Substance Over-Form doctrine. Unlike the Lone Star cases, the NTS did not base its taxation on personal income tax.

The analysis starts with Article 6(1) of Korea's Constitution, which is the provision about the role of international treaties in Korean law. Legal analysis then looks at Articles 38 and 59 of the Constitution which cover taxes as well as the role that Articles 26, 27, and 31 of the Vienna Convention play in interpreting tax law when read together with Article 6(2) of Korea's Constitution.

The Court analyses the case from the perspective of equality under Article 11(1) of the Constitution, before it accepts the submission that OECD Commentary is persuasive but not binding authority.

The Court's review of Article 13 of the Korea-Belgium Tax Treaty along with its analysis of the Substance Over Form doctrine closely tracks the two Lone Star cases. Unlike one of the Lone Star cases, the Korea-U.S. Tax Treaty was not an issue. And unlike both the Lone Star cases, the NTS did not make the mistake of levying personal income taxes against these two limited partnerships.

*interpretation and application of Tax Treaties, he said: "Of course. This is my view."*⁵¹¹

399. The Claimants contend that it was unlawful to consider the upstream U.S.- and Bermudian-based Lone Star as the substantive owners of the capital gains from the sale of shares because:
- (a) the Korea-Belgium Tax Treaty provides that Belgium, being the country of residence, is granted the right to tax capital gains from shares held by a resident of Belgium. There are no exceptions;
 - (b) the VCLT requires the language of a tax treaty to be interpreted in its ordinary sense. The key objective of a tax treaty is to limit taxation by the source country and give predictability in international trade to promote exchanges and investments;
 - (c) the objective is defeated if the tax authorities of the source country apply the tax treaty inconsistently based on foreign investors' source of capital;
 - (d) OECD commentary to the contrary is neither a source of law for taxpayers nor regulation as contemplated by the Constitution of Korea nor an international law or regulation whose effect is accepted as law; and
 - (e) even in the unlikely case that the Substance Over Form principle can be applied to the sale of the shares by Lone Star's Belgian corporations, and to the ownership of the gains therefrom, in the application of Substance Over Form, "the 'substance' in the said principle means the **legal** substance."⁵¹² [emphasis added]
400. In the tax litigation involving Star Holdings, the Seoul Administrative Court agreed that under Articles 26, 27 and 31 of the VCLT, a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty, since treaties must be performed and interpreted in good faith.

⁵¹¹ TD23, 385:22-386:6, citing TD14, 3651:7.

⁵¹² See "Summary of Plaintiff's Assertions" in the case of *Lone Star Fund III (Bermuda), L.P. v. Yeoksam District Tax Office (Exhibit RA-272 (also filed as Exhibit R-374), Seoul Administrative Court, Case No. 2007Guhap37520, Judgment, 16 February 2009, pp. 5-7).*

401. The Court noted that the constitutional principle of equality requires that tax burdens must be allocated among taxpayers in an equitable manner. Thus, “the objective of the treaty should not be confined simply to promote exchange of goods and services by preventing international double taxation ... ‘prevention of tax evasion’ is, just like ‘avoidance of double taxation,’ one of the principal objectives of the treaty.”⁵¹³
402. Article 13(1) of the Korea-Belgium Tax Treaty deals with capital gains from the “alienation of immovable property.”⁵¹⁴ The tax court of first instance (*i.e.*, the Seoul Administrative Court) held that:

*The substance over form principle, which is a principle derived from the doctrine of equality in taxation, is one of the general principles regarding the interpretation and application of tax laws and even assuming that Article 14 of the NTBL [FANT] does not expressly stipulate such principle, the substance over form principle as a constitutional principle can not [sic] be denied. Therefore, applying the substance over form principle to interpret tax laws and regulations can not [sic] be considered as contrary to the principle of strict interpretation [of tax statutes].*⁵¹⁵

403. Thus, the Belgian entity could not be considered an “alienator” within the protection of Article 13(3) of the Tax Treaty:

If any non-resident with a nationality other than Belgium incorporates a corporation in Belgium for the purpose of investing in Korea and conducts the business in Korea in the corporation’s name for the purpose of

⁵¹³ Exhibit RA-272 (also filed as Exhibit R-374), Seoul Administrative Court, Case No. 2007Guhap37520, Judgment, 16 February 2009, p. 11.

⁵¹⁴ Exhibit CA-264, Korea-Belgium Tax Treaty, Art. 13(1). The following Articles within the Korea-Belgium Tax Treaty are particularly relevant:

Art. 3(2): *As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are subject of this Convention.*

Art. 4(3): *Where by reason of the provisions of paragraph 1 a person other than an individual is resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.*

Art. 13(1): *Gains from the alienation of immovable property, as defined in paragraph 2 of Article 6, may be taxed in the Contracting State in which such property is situated.*

Art. 13(3): *Gains from the alienation of any property other than those mentioned in paragraphs 1 and 2, shall be taxable only in the Contracting State of which the alienator is a resident.*

⁵¹⁵ Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 10.

*obtaining capital gains, where the corporation has no normal business activity in Belgium, i.e. the country of residence of the corporation, and has no independent economic interest or business objective in its transactions in Korea, simply acting, only on paper, as a transactional party on behalf of an ultimate investor, who is the actual party to the transaction, solely for the tax avoidance on the part of the ultimate investor, the corporation should not be considered as an alienator under the Korea-Belgium Tax Treaty.*⁵¹⁶ [emphasis added]

404. The Respondent contends that there has been increasing State concern about abuse of tax treaties to achieve “double non-taxation” (i.e., the effective circumvention of taxes in both the source State and the residence State). Such double non-taxation may occur when tax treaties are used in conjunction with otherwise benign domestic tax regimes to avoid all taxation.⁵¹⁷ This conduct is described variably as “improper use of tax treaties,” “treaty abuse,” or “treaty shopping.”⁵¹⁸
405. The Respondent refers to the OECD and the United Nations model tax conventions. The Respondent’s tax expert, Professor ██████████ states that the OECD Model Convention is widely followed in the negotiation of income tax treaties.⁵¹⁹ The OECD has also issued a Commentary, which, although not legally binding, “carries significant weight in the interpretation of existing tax treaties,” according to Professor ██████████⁵²⁰
406. The OECD notes in its Commentary on the 1977 OECD Model Convention, that the purpose of tax treaties is not to facilitate tax evasion.⁵²¹ In 1986, the OECD addressed domestic Substance Over Form provisions in the context of the question whether such provisions are compatible with tax treaties and concluded that:

*The large majority of OECD member countries consider that rules of this kind are part of the basic domestic rules set by national tax law for determining which facts give rise to a tax liability. **These rules are not addressed in tax treaties and are therefore not affected by them.** [...]*

⁵¹⁶ Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, pp. 11-12.

⁵¹⁷ Expert Report of ██████████ 21 March 2014 (“██████████ First Expert Report”), para. 66.

⁵¹⁸ ██████████ First Expert Report, para. 68; Counter-Memorial, para. 398.

⁵¹⁹ ██████████ First Expert Report, para. 60.

⁵²⁰ ██████████ First Expert Report, para. 60.

⁵²¹ ██████████ First Expert Report, paras. 86-87.

[I]t is the view of the wide majority that such rules, and the underlying principles, do not have to be confirmed in the text of the convention to be applicable.⁵²² [emphasis added by this Tribunal]

407. The Claimants' tax expert, Professor ██████████ summarises the 2003 OECD Commentary as follows:

*In 2003, §7 of the OECD MC [Model Convention] Commentary on Article 1 was reworded and now states that: "It is also a purpose of tax conventions to prevent tax avoidance and tax evasion". The last sentence of §7 of the 1977 OECD MC Commentary on Article 1 (according to which States wishing to apply their domestic anti-avoidance provisions to cases of treaty abuse must explicitly provide so in the treaty) was deleted. The 2003 OECD MC Commentary now explains that domestic anti-avoidance rules, such as "substance over form" rules or general anti-abuse rules, are part of the basic rules for determining the facts that give rise to tax liability, that they are not addressed in tax treaties and that therefore they are not affected by them. To the extent that the application of such rules result [sic] in the re-characterization of income or in a redetermination of the taxpayer who is considered to derive such income, the provisions of tax treaties will be applied taking into account these changes.*⁵²³ [emphasis added by this Tribunal]

408. While Dr. ██████████ disagrees with the OECD view that Substance Over Form need not be specifically addressed in tax treaties, he agrees that the OECD Commentary is the product of broad consultation within the international tax community.
409. The Respondent notes that from 2003 and onward, the Commentary to Article 1 of the OECD Model Convention provides that "as a general rule, there will be no conflict between [anti-abuse provisions of domestic law] and the provisions of tax conventions."⁵²⁴ Belgium and Korea did not make any observations on this general rule.⁵²⁵ Indeed Belgium, according to the Respondent, regards its own tax authorities as having inherent authority to examine the substance of underlying transactions and not simply their form. The Respondent's expert, Professor ██████████ testified, "the Belgian position on the

⁵²² ██████████ First Expert Report, para. 88, citing Exhibit R-068, OECD, *Model Tax Convention on Income and on Capital* (2010), paras. 39-40.

⁵²³ Exhibit CWE-011, Expert Report of ██████████ 11 October 2013 ("█████████ First Expert Report"), para. 99, citing Exhibit CA-163, 2003 OECD Commentary on Article 1: Concerning the Persons Covered by the Convention.

⁵²⁴ ██████████ First Expert Report, para. 94, citing Exhibit R-068, OECD, *Model Tax Convention on Income and on Capital* (2010), paras. 8-9.4 and 22-21.1.

⁵²⁵ ██████████ First Expert Report, para. 98.

application of domestic law anti-abuse rules to tax treaties *matches* Korean law and policy ... Belgium endorses applying domestic law rules to prevent abuse of Belgian tax treaties.”⁵²⁶

The Tribunal’s Ruling on the Applicability of the Substance Over Form Doctrine

410. The Tribunal concludes that Korea’s application of the Substance Over Form doctrine did not violate the BIT because, as referenced by Dr. [REDACTED] the doctrine forms “part of the basic rules for determining the facts that give rise to tax liability.”⁵²⁷ It is only after the facts have been determined that the tax consequences are assessed, and it is only at the tax consequence stage, not the earlier fact-determination stage, that the Treaty provisions come into play. Here the judicial proceedings initiated by the Lone Star companies resulted in a rejection in the relevant cases of Lone Star’s version of facts. The Korean courts adequately explained why the application of Substance Over Form was not arbitrary but grounded in the evidence. Nor, in the opinion of the Tribunal, as will be discussed, was the application discriminatory.

C. THE RESPONDENT OBJECTS TO THE TAX CLAIMS ON THE BASIS OF TIMELINESS AND WAIVER

411. The Respondent argues that:

- (a) to the extent the Tribunal has jurisdiction over any of LSF-KEB’s tax-related claims, its jurisdiction is limited to evaluating whether the refusal of the NTS to refund withholding taxes collected by Credit Suisse violated Korea’s free transfer obligations under the 2011 BIT because the other refused claims were not asserted at any time prior to the Claimants’ Reply⁵²⁸ contrary to the Tribunal’s procedural

⁵²⁶ Counter-Memorial, para. 402, citing [REDACTED] First Expert Report, paras. 46, 109-111 (referring to Belgian authorities) [emphasis added by the Respondent].

⁵²⁷ Exhibit CWE-011, [REDACTED] First Expert Report, paras. 20, 99; see also Exhibit CA-520, R. de Boer and S. van Weeghel, “Anti-Abuse Measures and the Application of Tax Treaties in the Netherlands,” 60 Bulletin for International Taxation 8 (2006), p. 359 (“Domestic anti-abuse measures are to be considered part of the domestic rules set by domestic tax laws which determine the facts that give rise to a tax liability; such anti-abuse measures are not addressed in tax treaties and, as a consequence, no conflict can arise.”).

⁵²⁸ Rejoinder, para. 490.

ruling dated 8 July 2013, that the “Claimants must plead their positive case on jurisdiction, as well as the merits, *in their Memorial*;⁵²⁹ and

- (b) in any event, LSF-KEB’s refund-related BIT claim concerning the Hana withholding taxes is independently barred by Article 8(3) of the 2011 BIT, because Lone Star elected to pursue local remedies.⁵³⁰

412. The Claimants, of course, oppose the objection. The general proposition that the Claimants must plead their case in their Memorial is undoubted,⁵³¹ but exceptions are not infrequent and the Tribunal has authority under Rule 26 of the ICSID Arbitration Rules to “extend any time limit that it has fixed.”

413. With respect to the waiver objection, the Respondent points to Lone Star’s extensive litigation of its tax complaints in the Korean courts and object that it should not be obliged to relitigate the same tax issues in this arbitration. The Request for Arbitration, dated 21 November 2012 includes the following stipulation as follows:

Claimants also hereby waive their rights to initiate any proceedings under Article 8(2) of the Treaty – i.e., proceedings to obtain local remedies under Korean laws and regulations – with respect to the same dispute, which, as noted above, Article 8(1) of the Treaty defines as the dispute between the Republic of Korea and an investor of Belgium or Luxembourg ‘derived from an alleged breach of an obligation under this Agreement.’⁵³²

⁵²⁹ Rejoinder, para. 489, citing Decision on Procedural Issues, 8 July 2013, para. 14 [emphasis added by the Respondent].

⁵³⁰ Rejoinder, paras. 496 *et seq.* Exhibit C-001, 2011 BIT, Art. 8(3) provides:

3. *If the dispute cannot be settled within six (6) months from the date on which the dispute has been raised by either party, and if the investor waives the rights to initiate any proceedings under paragraph 2 of this Article with respect to the same dispute, the dispute shall be submitted upon request of the investor of the Contracting Party:*

- (a) to the International Centre for Settlement of Investment Disputes (ICSID) established by the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States [...]*

⁵³¹ Sur-Reply, para. 292.

⁵³² Request for Arbitration, para. 70. Exhibit C-001, 2011 BIT, Art. 8 provides (in relevant part):

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

414. The Respondent notes that two days earlier, on 19 November 2012, the Claimants had filed a proceeding before the Seoul Administrative Court challenging the NTS's denial of their request for a tax refund of the Hana Bank withholding taxes of 5 May 2012.⁵³³ The Respondent contends that the intent of Article 8(3) is clearly to prevent parallel claims in local and international jurisdictions with respect to the same disagreement and thereby to eliminate the risk of either inconsistent results or double recovery. On a purposeful interpretation of the BIT, the objection should be sustained.⁵³⁴
415. The Claimants rely on the specific wording of the waiver clause in the 2011 BIT ("waives the right to **initiate** any proceeding") and maintain that the record clearly shows that LSF-KEB initiated its proceedings *before* the Claimants submitted their Request for Arbitration on 21 November 2012.⁵³⁵
416. In any event, according to the Claimants, the 19 November 2012 filing ought not be construed as the filing of a "new proceeding," but rather as a continuation and/or appeal from administrative proceedings before the NTS that were filed by LSF-KEB months earlier to obtain the withholding refund to which it claimed entitlement. The Claimants

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1. *Any dispute between a Contracting Party and an investor of the other Contracting Party derived from an alleged breach of an obligation under this Agreement, including expropriation or nationalization of investments, shall be notified in writing by the first party to take action and shall be, as far as possible, settled by the parties to the dispute in an amicable way. The notification shall be accompanied by a sufficiently detailed memorandum.*
 2. *The local remedies under the laws and regulations [...].*
 3. *If the dispute cannot be settled within six (6) months from the date on which the dispute has been raised by either party, **and if the investor waives the rights to initiate any proceedings under paragraph 2 of this Article with respect to the same dispute, the dispute shall be submitted upon request of the investor of the Contracting Party:***
 - (a) *to the International Centre for Settlement of Investment Disputes (ICSID)[...]*
 4. [...]
 5. *Each Contracting Party hereby consents to the submission of a dispute to arbitration in accordance with the procedures set out in this Agreement. Such consent implies that both Parties waive the right to demand that all domestic administrative or judiciary remedies be exhausted. [emphasis added]*

⁵³³ Rejoinder, para. 499; Exhibit C-711, Seoul Administrative Court, Case No. 2012Guhap39544, LSF-KEB Complaint, 19 November 2012.

⁵³⁴ Rejoinder, paras. 501-503.

⁵³⁵ Sur-Reply, paras. 299-300.

submit that “[s]uch a continuation of proceedings already underway does not implicate the waiver of the right to initiate proceedings.”⁵³⁶

The Tribunal’s Ruling on Objections to Timeliness and Waiver

417. The tax issues have been argued comprehensively and at considerable length by the Respondent as well as by the Claimants. The Respondent has not established any significant prejudice by reason of the delay from delivery of the Memorial (where some of the tax claims were not raised) on 15 October 2013 to delivery of the Reply on 1 October 2014 (where all of the tax issues were raised). In the circumstances, the Tribunal declines to give effect to the timeliness objection.
418. The Tribunal agrees with the Claimants that the waiver provision in Article 8(3) of the 2011 BIT requires an investor only to waive its right to initiate local court proceedings before it submits its request for arbitration, but does not require it to discontinue cases pending already before an investor’s submission of its request for arbitration.
419. Accordingly, the Tribunal dismisses the Respondent’s timeliness and waiver objections and will proceed to address the tax claims.

D. USE OF TAX PLANNING

420. The Tribunal accepts, of course, that tax planning is a normal, indeed inevitable, part of a rational investment policy and that the application of Substance Over Form to deny international investment the protection of a tax treaty strikes at a common model of international investment; namely, resorting to tax-friendly jurisdictions.
421. However, as the OECD has commented, the investment model can be abused, and in the Tribunal’s view nothing in the Korea-Belgium Tax Treaty requires Korea to accept treaty abuse when its independent judges, to whom Lone Star has turned for adjudication, concluded that its Belgian investment vehicles were established exclusively for the purpose of tax avoidance. Lone Star failed to establish any other economic benefit and, as the courts

⁵³⁶ Sur-Reply, para. 299, n. 466.

held, the structures had no independent business purpose or engaged in significant business activities. It will be recalled that the Seoul Administrative Court held in 2009 that:

If any non-resident with a nationality other than Belgium [i.e., the Court is stating a general principle, not a rule specific to Lone Star] incorporates a corporation in Belgium for the purpose of investing in Korea and conducts the business in Korea in the corporation's name and for the purpose of obtaining capital gains, where the corporation has no normal business activity in Belgium, i.e. the country of residence of the corporation, and has no independent economic interest or business objectives in its transactions in Korea, simply acting, only on paper, as a transactional party on behalf of an ultimate investor, who is the actual party to the transaction, solely for the tax avoidance on the part of the ultimate investor, the corporation should not be considered as an alienator under the Korea-Belgium Tax Treaty.⁵³⁷

422. This test is heavily fact dependent. Lone Star took its evidence to the Korean courts and lost.
423. The Seoul Administrative Court held on the facts that Lone Star's Belgian investment vehicles were mere "conduits" and this specific point was upheld by the Supreme Court (it should be noted that the Korean courts protested that Lone Star had failed to provide them with sufficient evidence to consider seriously any other conclusion).⁵³⁸
424. The Claimants object to the tenacity and, they say, relentless pursuit of them by the NTS but it was the Korean courts and especially the Korean Supreme Court, not the NTS, that rejected the tax complaints now pursued by Lone Star in this arbitration.

E. THE CLAIMANTS DO NOT ALLEGE A "DENIAL OF JUSTICE"

425. Lone Star has been litigating its tax issues up and down the Korean court system for about 15 years. It has enjoyed significant success (and suffered some significant losses). The Korean Supreme Court, for example, set aside the Star Holdings assessment based on personal rather than corporate tax rates and rejected the NTS assertion that for tax purposes the Claimants should be held to have a "permanent establishment" in Korea. **The**

⁵³⁷ Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, pp. 11-12.

⁵³⁸ Exhibit R-176, National Tax Tribunal, Case No. Gukshim2007Seo5223, Judgment, 21 July 2010 ("Tax Tribunal Judgment, July 2010"), p. 10 ("In the present case, Claimant has failed to submit documents evidencing that Claimant has carried out investment activities as KEB shareholder or that the office located in Belgium has conducted business" [emphasis added]).

Claimants' own tax expert says the Korean courts are independent and fair.⁵³⁹
Counsel for Lone Star affirmed on 15 October 2020 that the "Claimants have not asserted a denial-of-justice claim against Korea's courts in this case and at this time."⁵⁴⁰

426. In the absence of a denial of justice claim, it seems that the Claimants decided to concentrate their fire on the NTS itself and ignore the court rulings which examined those NTS rulings, on occasion to the Claimants' advantage. The Claimants' counsel submitted at the 15 October 2020 oral hearing:

*The capital pooling entities that were the substantive owners in the first episode or that operated a PE [permanent establishment] in the second episode, they've suddenly disappeared from the NTS's analysis. The Korean [...] courts eventually rejected that approach, too, but what matters for present purposes is the absurdity of the gymnastics that the NTS performs in order to try to maximize Lone Star's taxes.*⁵⁴¹

The Tribunal's Ruling on Challenges to the NTS

427. In the Tribunal's view, every State is entitled to the benefit of its internal checks and balances. The NTS is part of a tax assessment structure that includes, at its apex, the Korean courts, which were called into action by the Claimants with a measure of success. It is true that over time, the NTS changed its tax approach from time-to-time but these alleged "inconsistent positions" were largely in response to court decisions. When one avenue was blocked, the NTS modified its approach, but this was a perfectly rational response to judicial rulings.
428. The Claimants take exception to "the NTS's striking and candid testimony to the Korean National Assembly where they promised to pursue the 'slightest grounds for taxation'"⁵⁴² but, indeed, such a statement by a governmental agency to the country's legislature may be said to be characteristic of tax collectors everywhere without implying that they intend to act unlawfully.

⁵³⁹ During his cross-examination, the Claimants' tax expert Professor ████████ agreed that Korean courts are "neutral and not biased against foreign parties" (TD13, 3622:17-20).

⁵⁴⁰ TD23, 416:4-6.

⁵⁴¹ TD23, 353:18-354:3.

⁵⁴² TD23, 358:12-15.

429. The difference between the NTS and the FSC is that the NTS was operating under the supervision of the Korean courts whereas the FSC's operations in relation to the Hana transaction were not.

F. THE CLAIMANTS' CHALLENGE TO SPECIFIC TAX ASSESSMENTS

430. This series of tax issues relates to four Korean investments made by Lone Star, namely Star Tower, KEB, Kukdong and Star Lease, that resulted in taxation as follows:

- (a) the sale of shares in Star Tower in 2004;
- (b) the sale of shares in Kukdong and Star Lease and the sale of a 13.6% block of the shares in KEB in 2007, along with the dividends paid by KEB, Kukdong and Star Lease between 2004 and 2007;
- (c) the dividends paid by KEB between 2008 and 2011; and
- (d) the sale of the remaining 51% of shares in KEB to Hana in 2012.

431. The Tribunal recalls its ruling on jurisdiction that excludes (a) and (b) by reason of the fact the relevant disputes predated 27 March 2011 and therefore fall outside the 2011 BIT.

432. With respect to the dividends paid by KEB to LSF-KEB between 2008 and 2011, the Respondent states⁵⁴³ that in 2012 during a routine investigation of Citibank Korea Inc. which had no relationship to Lone Star's previous ownership of KEB shares,⁵⁴⁴ the NTS discovered that Citibank had made payment of KEB dividends to LSF-KEB withholding only 15 percent of the amount that KEB paid (nominally) to LSF-KEB on the assumption that the Korea-Belgium Tax Treaty applied.⁵⁴⁵ The NTS took the position that LSF-KEB was a conduit company, and not the substantive owner of KEB shares and therefore payments nominally made to LSF-KEB were not entitled to benefits under the Korea-Belgium Tax Treaty.⁵⁴⁶ The Respondent says there was no evidence to suggest a change

⁵⁴³ Counter-Memorial, para. 589.

⁵⁴⁴ I.N. Kim Witness Statement, para. 5.

⁵⁴⁵ I.N. Kim Witness Statement, para. 7.

⁵⁴⁶ D.G. Hwang Witness Statement, para. 30; I.N. Kim Witness Statement, para. 6.

in LSF-KEB's conduit company status during the relevant time period⁵⁴⁷ and Citibank therefore should not have applied the dividend tax rate from the Korea-Belgium Tax Treaty.⁵⁴⁸

433. With respect to the sale of KEB shares to Hana in 2012, the Respondent says⁵⁴⁹ that in a "somewhat unusual provision"⁵⁵⁰ Hana had agreed in the 2010 and 2011 SPA not to withhold or deduct any capital gains tax from the purchase price "payable under this agreement." Hana sought from the NTS an order specifying that Hana must withhold taxes in this transaction to enable it to both fulfil its withholding obligation under Korean law and also meet its contractual obligation under the SPA.⁵⁵¹ The NTS sent a "guidance" letter in January 2012⁵⁵² that Hana took as authority on 5 March 2012 to pay KRW 391.6 billion (approximately USD 350 million) to the Respondent as withholding tax pursuant to Article 98 of the Corporate Income Tax.⁵⁵³
434. The Respondent contends that the tax treatment in the above transactions was correct and proper and was upheld in the Korean Courts in litigation which the Claimants do not make any allegation of denial of justice.

⁵⁴⁷ I.N. Kim Witness Statement, para. 6; **Exhibit R-176**, Decision of the Korean Nation Tax Tribunal, 21 July 2010.

⁵⁴⁸ I.N. Kim Witness Statement, para. 6.

⁵⁴⁹ See Counter-Memorial, para. 579.

The November 2010 SPA provided in relevant part as follows:

11.9.5 The Purchaser agrees not to (in the absence of a written order of the NTS requiring such withholding or payment on or prior to Closing) withhold or deduct any capital gains tax with respect to any consideration payable under this Agreement under Korean law. [Exhibit C-227, Art. 9.5]

This provision was revised slightly in the Amended and Restated Share Purchase Agreement dated 3 December 2011, as follows:

11.8.5 The Purchaser agrees not to (in the absence of a written order of the NTS requiring such withholding or payment by the Purchaser on or prior to Closing) withhold or deduct any capital gains tax with respect to any consideration payable under this Agreement under Korean law. [Exhibit C-280, Art. 11.8.5]

⁵⁵⁰ Reply, para. 578.

⁵⁵¹ [REDACTED] Witness Statement, para. 36.

⁵⁵² **Exhibit C-361**, Letter from SRTO to Hana, 18 January 2012.

⁵⁵³ **Exhibit C-218**, Hana Tax Payment Receipt, 5 March 2012.

435. The Claimants allege that the earlier disputes provide the necessary background to assist in understanding the post-2011 tax claims and the Tribunal will therefore address the pre-2011 events for that limited purpose.
436. The Claimants focus in particular on the actions of the NTS in respect of:
- (a) an allegedly abusive April 2005 raid on Lone Star's Seoul office linked to Lone Star's sale of Star Tower shares;
 - (b) the NTS's taxation of capital gains from Lone Star's sale of Star Tower Building contrary to the Korea-Belgium Tax Treaty;
 - (c) withholding tax on the 2007 KEB share sale through Credit Suisse;
 - (d) taxation of dividends and capital gains derived from an investment in Star Lease;
 - (e) taxation of dividends and capital gains derived from an investment in Kukdong Construction;
 - (f) taxation of 2004–2007 dividends; and
 - (g) LSF-KEB Holdings tax claims in respect of dividends received from KEB between 2004 and 2007,⁵⁵⁴
437. All of these pre-2011 transactions, the Claimants say, support their allegations of violation of the BIT in respect of:
- (i) the 5 March 2012 withholding tax on the proceeds from the sale of its equity stake in KEB to Hana Bank;⁵⁵⁵ and

⁵⁵⁴ Exhibit C-297 / RA-231, Administrative Court Judgment, February 2013; see also Exhibit C-196, Letter from Joon-Soo Song, Deputy Director of the International Investigation Division, Seoul Regional Tax Office, 4 July 2008.

⁵⁵⁵ Exhibit C-361, Letter from SRTO to Hana, 18 January 2012 (providing "[n]otice of the obligation to withhold tax on gains from the alienation of shares by a foreign corporation").

- (ii) the 11 March 2013 retroactive assessment against Citibank in respect of taxes on KEB dividends paid to LSF-KEB between 2008 and 2011⁵⁵⁶ (although the 11 March 2013 assessment was imposed on Citibank Korea, the custodian of LSF-KEB's shareholdings in Korea, LSF-KEB claims status to bring the claim because it was required to indemnify Citibank for any losses arising from its role as custodian).⁵⁵⁷

438. Aside from the NTS's raid of 12 April 2005, which presents discrete search and seizure issues, the Claimants' overarching assertion is that the NTS was contradictory, inconsistent and abusive, in its legal arguments.⁵⁵⁸

(1) NTS Raid: 12 April 2005

439. The Claimants complain of the warrantless search by the NTS of Lone Star's Korean office on 12 April 2005. The search was illegal, the Claimants argue, and they have submitted many media reports from mid- to late-April 2005. These articles report that during the week of 11 April 2005 the NTS carried out a series of raids on the offices of foreign companies.⁵⁵⁹ Lone Star was one of these companies. Others included the Carlyle

⁵⁵⁶ Exhibit C-144, Tax Assessment Notice to Citibank Korea Concerning Withholding on Dividends (2008-2011), 11 March 2013.

⁵⁵⁷ Exhibit C-333, Tax Matters Agreement Between LSF-KEB Holdings, SCA and Citibank Korea Inc., 27 March 2013; Exhibit C-334, Receivable Assignment Agreement Between LSF-KEB Holdings, SCA and Citibank Korea Inc., 27 March 2013. See Memorial, para. 454, n. 834 ("On March 28, 2013, LSF-KEB paid the additional national tax assessed, KRW 103,187,781,960, to Citibank Korea, which then paid that same sum to the NTS the next day. On May 30, 2013, LSF-KEB paid the additional local tax assessed, KRW 10,318,778,120, to Citibank, which paid that sum to the NTS the following day.")

⁵⁵⁸ See Exhibit CWE-012, [REDACTED] First Expert Report; Exhibit CWE-032, Second Expert Report of [REDACTED] 24 September 2014 ("[REDACTED] Second Expert Report").

⁵⁵⁹ Exhibit C-529, "Tax Raids Rattle Overseas Funds," *The Chosun Ilbo*, 14 April 2005 ("The National Tax Service has raided the Korean offices of several overseas investment funds including tax haven-based Lone Star as part of a comprehensive tax-probe.")

Group,⁵⁶⁰ the Government of Singapore Investment Corp. (which was Lone Star's counterparty in the Star Tower sale);⁵⁶¹ Citigroup;⁵⁶² and Newbridge Capital LLC.⁵⁶³

440. Ten days after the raid, the Korean media reported the justification offered by the NTS:

The inflow of foreign capital after the financial crisis is said to have brought many positive effects to our economy.

By acquiring insolvent financial institutions and companies, the foreign capital contributed significantly to the speedy restructuring of financial institutions and companies, and by increasing the inflow of foreign capital into the local stock market, it helped to strengthen the base of our frail stock market as well as prevent the stagnation of the stock market.

* * * * *

More than anything, the Korean people have doubt on the foreign funds, which enjoyed large profits through such activities but did not pay a penny of tax by using tax havens.

It is the rightful duty of the NTS to inspect, based on the international taxation standards, the foreign funds as well as the local companies on whether they are conducting normal or irregular transactions.⁵⁶⁴

441. One national commentator noted at the time, "[t]he blitzkrieg style of tax probes is also somewhat inevitable to prevent the destruction of documents. **And tax audits on Korean firms are done in similar fashion and for the same reasons.**"⁵⁶⁵

442. Regarding evidence obtained during this warrantless raid, Professor [REDACTED] states that "[i]n a criminal case, any evidence gathered by an illegal procedure is not admissible as a

⁵⁶⁰ Exhibit C-080, "Seoul tax inquiry on foreign funds," *The New York Times*, 15 April 2005; Exhibit C-081, "NTS reveals that it sought prior consent before commencing the tax audit of foreign funds," *Korea Economic Daily*, 15 April 2005.

⁵⁶¹ Exhibit C-080, "Seoul tax inquiry on foreign funds," *The New York Times*, 15 April 2005; Exhibit C-645, "Foreign Fund Probe Hits Stock Market," *The Korea Times*, 16 April 2005

⁵⁶² Exhibit C-080, "Seoul tax inquiry on foreign funds," *The New York Times*, 15 April 2005.

⁵⁶³ Exhibit C-888, "Tax office probes foreign investors," *The Korea Herald*, 16 April 2005; Exhibit C-552, "Investment climate for foreigners showing signs of a coming storm," *Korea JoongAng Daily*, 17 April 2005.

⁵⁶⁴ Exhibit C-083, "On its homepage, NTS emphasizes the necessity of 'tax audit into foreign funds,'" *Money Today*, 22 April 2005. See also Exhibit C-551, "Tax agency says outcry drove probe," *Korea JoongAng Daily*, 15 April 2005.

⁵⁶⁵ Exhibit C-087, "Foreign Funds' Frowns," *The Korea Times*, 25 April 2005 [emphasis added]. An article from January 2008 shows that tax audits are unusually common in Korea; see Exhibit C-609, "The Tax Service Has Become a Weapon of the Powerful," *The Chosun Ilbo*, 7 January 2008 ("[H]onest businesses say they have a hard time because tax authorities won't stop probing them until a minor discrepancy is discovered."). The article does not distinguish between foreign and domestic businesses.

fruit of a poisonous tree.”⁵⁶⁶ However, the evidence at issue here was before the Korean courts. Indeed, Lone Star went to Korea’s Supreme Court in both 2012 and in 2016. The alleged illegality was or ought to have been squarely before the Korean courts. Exclusion of evidence was not raised as an issue in the Star Tower cases. In 2012, Lone Star Fund was successful in having its assessment on a “personal tax” basis set aside as a matter of tax law.⁵⁶⁷ The NTS reassessed Lone Star on a “corporate” tax basis.⁵⁶⁸ Lone Star litigated the reassessment, eventually losing its Supreme Court appeal on 15 December 2016.⁵⁶⁹

443. According to news articles submitted by the Claimants, invasive tax audits appear to be something that domestic and foreign businesses both face in Korea.⁵⁷⁰ There was no discrimination against foreign investors. The Claimants have not alleged that there has been a denial of justice in the resulting tax litigation. In the Tribunal’s view, Lone Star has not established that the April 2005 tax raid nor use of the evidence thereby obtained violated the 2011 BIT or the Tax Treaty.

(2) Star Tower Building: Lone Star’s 2004 Sale and Capital Gains

444. In 2001, Claimant Star Holdings SCA invested KRW 100 billion (approximately USD 80 million) in Star Tower Corporation, a Korean company that owned a large office building in the business district of Seoul.⁵⁷¹ In December 2004, Star Holdings sold its shares in Star Tower Corporation to affiliates of the Government of Singapore Investment Corporation

⁵⁶⁶ Exhibit CWE-012, [REDACTED] First Expert Report, para. 138, referring to Exhibit CA-116, Supreme Court of Korea, Case No. 2009Do11401, Judgment, 24 December 2009.

⁵⁶⁷ Exhibit C-288, Supreme Court of Korea, Case No. 2010Du5950, Judgment, 27 January 2012 (concerning Lone Star Fund III (U.S.), L.P.); Exhibit C-289, Supreme Court of Korea, Case No. 2010Du19393, Judgment, 27 January 2012 (concerning Lone Star Fund III (Bermuda). L.P.).

⁵⁶⁸ Exhibit C-358, Tax (Re-)Assessment Notice to Lone Star Fund III (U.S.), L.P. Concerning the Star Tower Sale, 13 February 2012; Exhibit C-359, Tax (Re-)Assessment Notice to Lone Star Fund III (Bermuda), L.P. Concerning the Star Tower Sale, 13 February 2012; Exhibit C-360, Tax (Re-)Assessment Notice to Lone Star Fund IV (U.S.), L.P. Concerning the 2004–2007 Tax Audit, 13 February 2012.

⁵⁶⁹ Exhibit R-589, Supreme Court of Korea, Case No. 2015Du2611, Judgment, 15 December 2016.

⁵⁷⁰ Exhibit C-087, “Foreign Funds’ Frowns,” *The Korea Times*, 25 April 2005; Exhibit C-609, “The Tax Service Has Become a Weapon of the Powerful,” *The Chosun Ilbo*, 7 January 2008.

⁵⁷¹ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 7; Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 13.

for KRW 351 billion, earning what Claimants describe as “significant capital gains” on the sale.⁵⁷²

445. The sale was affected not by a conveyance of title but through a sale of shares in the building’s ownership. The Lone Star vendor did not report capital gains from the sale on the basis that Star Holdings was a Belgian resident. Lone Star cited Article 13 of the Korea-Belgium Tax Treaty as the basis for not reporting capital gains from the sale.
446. The NTS assessed tax on the entirety of the gains from the sale of Star Tower. The Claimants state that in making the assessment on 15 December 2005, the NTS wrongly characterised Star Holdings as nothing more than a “conduit company” not entitled to the full tax exemption for capital gains under Article 13 of the Korea-Belgium Tax Treaty.⁵⁷³ In effect, Lone Star complains that the NTS applied the tax treaties relevant to the upper-tier entities to avoid giving Lone Star any treaty benefits on the sale of Star Tower.
447. The NTS identified the U.S. and Bermudan investment entities as the purported “correct” taxpayers for this income. Because Korea does not have a tax treaty with Bermuda, the NTS taxed the investment proceeds attributable to the Bermudan investment entities at the full non-treaty rate. As to the proceeds attributable to the U.S. capital-pooling partnership, the Korea-U.S. Tax Treaty is identical to the Korea-Belgium Tax Treaty in terms of its treatment of capital gains from the sale of shares. However, the evidence is that the United States and Korea had reached an agreement, not reflected in the text of the Treaty itself, which allowed the NTS to tax the capital gains in question.⁵⁷⁴
448. The Seoul Administrative Court traced the origin of Lone Star’s tax plan to a memorandum from Lone Star’s corporate counsel, Mr. [REDACTED] to Messrs. [REDACTED] and [REDACTED]

⁵⁷² Memorial, para. 374; Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 2.

⁵⁷³ Memorial, para. 375.

⁵⁷⁴ Memorial para. 375 and n. 737 (“This purported ‘agreement’ pertained to so-called Korean ‘real estate holding companies,’ which are Korean companies “whose assets are comprised primarily of real property.” However, as explained in Professor [REDACTED] First Expert Report, “there was no such agreement and, absent a modification to the Korea-U.S. Tax Treaty, taxation by the NTS of a U.S. resident on such gain was prohibited.” Professor [REDACTED] explains in more detail the historical context of the NTS’s determination that “Korea could tax capital gains earned on shares in companies that qualify as real estate holding companies (or ‘real-estate rich companies’ in the Korean) in his expert opinion;” see Exhibit CWE-012, [REDACTED] First Expert Report, paras. 120-128.

advising on tax efficient real estate investments in Korea.⁵⁷⁵ His tax-driven advice was substantially implemented in respect of the Star Tower office building investment.⁵⁷⁶ The Korean courts concluded that Lone Star had created the corporate structure to avoid paying taxes. In their view, Star Holdings SCA was established solely for the purpose of obtaining tax exemptions under the Korea-Belgium Tax Treaty.⁵⁷⁷

449. Star Holdings SCA was a “conduit” company without any purpose other than tax avoidance. Lone Star Fund III had paid for all the transactions in Star Holdings SCA’s name. The officers of Star Holdings SCA and its upper level holding companies were all related to Lone Star and appointed by Lone Star. Thus, it was appropriate to employ the

⁵⁷⁵ Exhibit R-199, Memorandum from [REDACTED] to [REDACTED] and [REDACTED] 26 September 2000.

⁵⁷⁶ The transaction included:

- 14 June 2001 – Star Holdings SA was incorporated in Belgium (Exhibit R-589, Supreme Court of Korea, Case No. 2015Du2611, Judgment, 15 December 2016, p. 4);
- 15 June 2001 – Star Holdings SA purchases C&J Trading Company (a Korean company), renaming it Star Tower Corp. (Exhibit R-187, Lone Star Fund III Interoffice Funding Memorandum, 1 June 2001, p. 1);
- 18 June 2001 – Lone Star Fund III (U.S.) L.P. executes an Agreement of Purchase and Sale with Hyundai Development Company (Exhibit R-194, Purchase and Sale Agreement Between Hyundai Development Company and Lone Star Fund III (U.S.), L.P., 18 June 2001); and
- 18 June 2001 – Lone Star Fund III (U.S.) L.P. executes an assignment and assumption agreement with Star Tower Corp. (Korea), assigning rights and obligations to Star Tower Corp. (Exhibit R-206, Assignment and Assumption Agreement Between Star Tower Corporation and Lone Star Fund III (U.S.), L.P., 18 June 2001).

Further details about these transactions are found in a contemporaneous intraoffice memo, which provides wiring instructions for the purchase money; see Exhibit R-195, Lone Star Fund III Interoffice Funding Memorandum, 19 June 2001 (regarding a funding request for the first instalment of the Star Tower building).

⁵⁷⁷ See, e.g., Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 17 (“As a result of such research and analysis, Lone Star Fund III established SH [Star Holdings SCA] solely for the purpose of obtaining from the Korean government a tax exemption on capital gains from transfer by a Belgian company of shares in Korea pursuant to the Korea-Belgium Tax Treaty and purchased STC [Star Tower Corporation] and the Star Tower Building through SH.”); Exhibit C-219, Seoul High Court, Case No. 2009Nu8016, Judgment, 12 February 2010, p. 17 (“As a result of such research and analysis, Lone Star Fund III established SH [Star Holdings SCA] in Belgium for the purpose of obtaining from the Korean government a tax exemption on capital gains on the transfer by a Belgian company of Korean shares pursuant to the Korea-Belgium Tax Treaty and purchased STC [Star Tower Corporation] and the Star Tower Building through SH.”). This decision was reversed on other grounds; see Exhibit C-288, Supreme Court of Korea, Case No. 2010Du5950, Judgment, 27 January 2012. For the reassessment litigation under the *Corporate Income Tax Law*, see Exhibit R-589, Supreme Court of Korea, Case No. 2015Du2611, Judgment, 15 December 2016, p. 8 (“SH [Star Holdings SCA] should be considered a mere conduit company for the sole purpose of avoiding capital gains tax in Korea ...”).

Substance Over Form doctrine and deny the capital gains exemption under Article 13 of the Korea-Belgium Tax Treaty.⁵⁷⁸

450. Lone Star took the position that even if Substance Over Form applied, “substance” must mean “legal substance.” Transactions between the parties cannot be restructured by the NTS contrary to the legal form, unless specifically authorised (which it was not). Star Holdings SCA was incorporated for investment efficiency and business objectives and not simply for the purpose of avoiding taxes. Star Holdings SCA was “the effective alienator of the Shares and the Substantive owner of the capital gains from the sale thereof.”⁵⁷⁹
451. The Korean courts held that application of Substance Over Form did not reconstitute the legal relationships but only the tax consequences. However, the NTS was wrong to assess

⁵⁷⁸ There were parallel proceedings in the Seoul Administrative Court involving Lone Star Fund III (U.S.), L.P. (Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009) and Lone Star Fund III (Bermuda), L.P. (Exhibit RA-272 (also filed as Exhibit R-374), Seoul Administrative Court, Case No. 2007Guhap37520, Judgment, 16 February 2009). In both cases, the Seoul Administrative Court analysed the minutiae of transactions dating back to 1995. Some of the key findings of fact are as follows:

- Interoffice memos dated 26 November 2002 and 17 January 2002 discuss Star Holdings’ status as an SA. The Court highlighted the following statement, “it is possible to avoid capital gains tax if the corporate structure of SH [Star Holdings] is changed to an SCA from an SA while maintaining the Belgian company in Belgium as it is” [emphasis added] (Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 15, referring to Exhibit R-200, Handwritten memorandum and various email correspondence, 17 January 2004).
- The Court highlighted an internal email of 16 July 2004 from Mr. [REDACTED] to Mr. [REDACTED] (Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 15). The original document states in English: “By the way, it is my personal opinion that we will sell the building north of 900 billion won and probably closer to 940 billion won. **The key will be to force the buyer to buy the shares** of Star Tower Corp so that we don’t have significant tax leakage” [emphasis added] (Exhibit RA-193, Emails Between [REDACTED] and [REDACTED] 17 July 2004 (regarding Dallas Line–Star Tower)).
- Star Tower Corp. did not perform any other business activities nor did Star Holdings SCA other than transferring Star Tower Corp. shares.
- Star Holdings only had a single employee in 2003.
- On 29 December 2004, one day after the sale of the Star Tower Building closed, Star Holdings SCA’s Board of Directors met and agreed to liquidate the company. Star Holdings SCA was liquidated on 31 March 2005.
- The Court also noted “there is no specific material supporting that SH [Star Holdings SCA] and its upper-level holding companies conducted substantive business activities in their resident country other than their investing in the Star Tower Building ...” ((Exhibit C-212 / RA-270, Administrative Court Judgment, February 2009, p. 17).

⁵⁷⁹ Exhibit RA-273, Seoul High Court, Case No. 2009Nu8009, Judgment, 19 August 2010, p. 10 (concerning Lone Star Fund III (Bermuda), L.P.).

the Limited Partnerships' taxes based on levels of **personal** income tax rather than corporate income tax.⁵⁸⁰

452. Following the Supreme Court's judgments of 27 January 2012, the NTS reassessed on the basis of corporate rather than personal tax.⁵⁸¹ Lone Star unsuccessfully litigated the NTS's reassessments. In December 2016, the Supreme Court rejected Lone Star's argument with respect to the applicability of the Korea-U.S. Tax Treaty and various constitutional arguments.⁵⁸² The Supreme Court upheld the determination of the lower court that the Belgian "conduit" corporation was not entitled to the benefit of the Korea-Belgium Tax Treaty.⁵⁸³

⁵⁸⁰ **Exhibit C-288**, Supreme Court of Korea, Case No. 2010Du5950, Judgment, 27 January 2012; **Exhibit C-289**, Supreme Court of Korea, Case No. 2010Du19393, Judgment, 27 January 2012.

⁵⁸¹ **Exhibit C-358**, Tax (Re-)Assessment Notice to Lone Star Fund III (U.S.), L.P. Concerning the Star Tower Sale, 13 February 2012; **Exhibit C-359**, Tax (Re-)Assessment Notice to Lone Star Fund III (Bermuda), L.P. Concerning the Star Tower Sale, 13 February 2012; **Exhibit C-360**, Tax (Re-)Assessment Notice to Lone Star Fund IV (U.S.), L.P. Concerning the 2004–2007 Tax Audit, 13 February 2012.

⁵⁸² **Exhibit R-589**, Supreme Court of Korea, Case No. 2015Du2611, Judgment, 15 December 2016, pp. 10-14.

⁵⁸³ **Exhibit R-589**, Supreme Court of Korea, Case No. 2015Du2611, Judgment, 15 December 2016. In part, the Supreme Court ruled as follows (pp. 8-9):

Because the substance over form [sic] principle can serve as a standard in interpreting and applying a provision of a tax treaty, the lower court assumed that the principle also applies in interpreting the Convention between the Republic of Korea and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the "Korea-Belgium Tax Treaty"). Next, the lower court found that considering the following points as a whole based on the facts discussed above, SH [Star Holdings SCA] should be considered a mere conduit company for the sole purpose of avoiding capital gains tax in Korea by receiving the application of the Korea-Belgium Tax Treaty, rather than for the efficient management and operation of the fund's investment capital and investment assets: (i) Belgium corporation SH and its upper-level holding companies were all corporations Lone Star Fund controlled and used for the purpose of forming an optimal investment control structure designed to avoid tax in Korea, cannot be considered as having any business purpose or activity other than serving as the formal investment holding companies for Lone Star Fund III, and had no independent economic profits in relation to the purchase and transfer of the Shares, (ii) in substance, all the funds for the purchase and capital increase of STC [Star Tower Corporation] and the purchase of the Star Tower Building were paid by Lone Star Fund III, and all the processes including the purchase of the Shares, purchase of the Star Tower Building, and the subsequent transfer of the Shares were in fact led by officers of Lone Star Fund III or officers of the asset management company in Korea which was under the control and management by Lone Star Fund III, and SH was merely the principal entity in form only, and (iii) after the transfer of the Shares, all the sales proceeds including the investment income therefrom were

(3) Tax Arising from Lone Star's 2007 Sale of Shares in KEB, Kukdong and Star Lease and Receipt of Related Dividends from 2004–2007

453. In 2002 and 2003, five of the Claimants purchased shares of stock in KEB, Kukdong, and Star Lease.⁵⁸⁴ Similarly to Star Holdings, these Claimants were primarily funded and indirectly owned by several capital-pooling entities based in the United States and Bermuda.⁵⁸⁵ Between 2004 and 2007, these Korean companies paid dividends to their respective shareholders and withheld tax at the 15% preferential rate specified under the Korea-Belgium Tax Treaty.⁵⁸⁶ The NTS did not question withholding tax at this rate as it was reported. However, following a 2008 audit, the NTS concluded that the appropriate tax treatment was not to apply withholding tax to a non-resident Belgian company but to apply the full Korean domestic rate on the basis that the taxpayers maintained a Permanent Establishment (“PE”) in Korea and that the capital gains and dividends were business profits attributable to that PE.⁵⁸⁷
454. The NTS had already collected 11% of the purchase price of the KEB shares from Credit Suisse, who served as the broker for that sale and thus was, under Korean tax law, the withholding tax agent with respect to the sale. The NTS applied this withholding tax

liquidated by Lone Star Fund III and distributed to the individual investors of Lone Star Fund III in a short period of time. Thus, the lower court determined that because SH cannot be considered a substantive alienator of the Shares or a substantive owner of capital gains therefrom, SH cannot be exempted from taxation in Korea under Article 13 of the Korea-Belgium Tax Treaty. [emphasis added]

⁵⁸⁴ LSF-KEB Holdings SCA purchased shares in KEB, LSF-SLF Holdings SCA and HL Holdings SCA purchased Star Lease, and Kukdong Holdings I SCA and Kukdong Holdings II SCA purchased Kukdong.

⁵⁸⁵ Lone Star Fund IV (U.S.), L.P. invested in all three investments, as did Bermudan co-investment entities for employees. Lone Star Fund IV (Bermuda), L.P. invested in Kukdong and Star Lease. Six Bermudan special purpose partnerships (LSF IVB Korea I L.P., LSF IVB Korea II L.P., KEB Investors, L.P., KEB Investors II, L.P., KEB Investors III P., and KEB Investors IV, L.P.) invested in KEB and had both U.S. and non-U.S. investors as limited partners.

⁵⁸⁶ KEB paid dividends in 2007. Kukdong paid dividends in 2004, 2005, and 2006. Star Lease paid dividends in 2006.

⁵⁸⁷ Exhibit CWE-012, [REDACTED] First Expert Report, paras. 171, 212-215. As Professor [REDACTED] explains, the NTS argued that 21% of the gains from the 2007 sales and 100% of the dividends from 2004–2007 were attributable to a Permanent Establishment based on allegations concerning the activities of certain LSAK and HAK (two Lone Star-affiliated service providers) officers. The 21% ratio was calculated using the number of days that those officers were in Korea as directors of LSAK and HAK over the total number of days of the investment; see [REDACTED] First Expert Report, paras. 171, 176-181. Not only did the NTS completely reverse its position with respect to the STC sale in 2004 (where it found no Permanent Establishment), the NTS assessed additional Permanent Establishment-based tax (on top of that already withheld and remitted) on the dividends, some of which were paid in 2004, in the very same year as the Star Tower Corporation sale.

against the tax liability it found based upon its later Permanent Establishment determination, but declined to refund the withholding tax.⁵⁸⁸ Thus, according to the Claimants, the NTS simultaneously pursued two mutually exclusive taxes on the same income – withholding tax based on the lack of a PE and direct taxation based on the presence of one.⁵⁸⁹

455. The Seoul Administrative Court accepted Lone Star's argument that the NTS had not proven that Permanent Establishments in Korea existed for the purposes of taxation.⁵⁹⁰ The NTS's assessments against the Lone Star entities were cancelled,⁵⁹¹ and costs were awarded against the NTS.
456. The NTS appealed this loss to the Seoul High Court.⁵⁹² The Seoul High Court dismissed the appeal.⁵⁹³ The Court awarded costs against the NTS.
457. On further appeal to the Korean Supreme Court, the NTS raised three grounds of appeal, all of which were rejected, and the Seoul Administrative Court's initial decision to cancel

⁵⁸⁸ Exhibit C-027, Seoul Administrative Court, Case No. 2010Guhap38684, Judgment, 17 September 2013, p. 3.

⁵⁸⁹ Memorial, para. 384.

⁵⁹⁰ Exhibit C-297 / RA-231, Administrative Court Judgment, February 2013, pp. 19-20. To prove that the Lone Star entities had a Korean PE, the NTS had to prove:

[i] an employee of the foreign corporation or person receiving instruction from the foreign corporation should carry on not preparatory or auxiliary activities but "essential and important business activities," [ii] through a "fixed place of business" in Korea such as a building, facility, or equipment, [iii] which the foreign corporation has "the right to use or dispose of." The character and scale of the business activity along with the importance and role of the business activity in the entire business activity must all be considered in deciding whether a business activity is an "essential and important business activity." [citations omitted]

⁵⁹¹ The NTS seems to have argued that a Permanent Establishment should have been found because Messrs. [REDACTED] and [REDACTED] had worked in various capacities for Lone Star entities. Thus, the NTS seems to have premised its argument on an agency theory. This is examined in more detail in the Korean Supreme Court's final decision on this matter; see Exhibit R-592, Supreme Court of Korea, Case Nos. 2014Du3044 and 2014Du3051 (Consolidated), Judgment, 12 October 2017, pp. 10-11.

⁵⁹² Exhibit C-686, Seoul High Court, Case Nos. 2013Nu8792 and 2013Nu8808, Judgment, 10 January 2014. It is also worth noting that Lone Star did not file a cross-appeal on the Seoul Administrative Court's finding that the Substance Over Form doctrine could be used to avoid looking at the Korea-Belgium Tax Treaty.

⁵⁹³ The Court's opinion is barely two-and-a-half pages and concludes: "Given the foregoing, the decision by the first-level court is justified and the Defendant's appeal is groundless. The Defendant's appeal is hereby dismissed, [and] the 1st paragraph of the text of judgement in the decision by the first-level court is corrected. Therefore, we rule as stated in the text of this judgement" (Exhibit C-686, Seoul High Court, Case Nos. 2013Nu8792 and 2013Nu8808, Judgment, 10 January 2014, pp. 3-4).

the tax assessments was affirmed.⁵⁹⁴ The Court awarded costs against the NTS. Based on the most recent submissions of counsel, Lone Star entities have received a tax refund of KRW 29,256,863,290. The Claimants maintain that they are entitled to a refund of the full KRW 176 billion.⁵⁹⁵ The issue is still pending.

(4) The March 2013 Assessment of Tax Arising from 2008–2011 KEB Dividends

458. Between 2008 and 2011, Citibank Korea (“CKI”), acted as custodian of the LSF-KEB shares in KEB, withheld and paid tax on the KEB dividends at the preferential rate provided in the Korea-Belgium Tax Treaty based on LSF-KEB’s status as a *bona fide* Belgian resident.

459. In March 2013, however, the NTS imposed withholding taxes and penalties on CKI for failing to withhold tax at the higher general domestic rates.⁵⁹⁶ The NTS made its determination following a periodic audit of KEB that began in May 2012.⁵⁹⁷ During that 2012 audit, the NTS relied on findings of fact that Korea’s Tax Tribunal had made in July 2010 regarding LSF-KEB Holdings SCA.⁵⁹⁸

⁵⁹⁴ Exhibit R-592, Supreme Court of Korea, Case Nos. 2014Du3044 and 2014Du3051 (Consolidated), Judgment, 12 October 2017.

⁵⁹⁵ Letter from Counsel for the Claimants to the Tribunal, 12 January 2018, p. 3 states:

Subsequent to the PE Judgement, the national and local tax authorities in Korea refunded a portion of the 2012 PE Assessment amount, with interest, to Claimants’ upstream affiliates Lone Star Fund IV U.S. LP, Lone Star Fund IV Bermuda LP, and Hudco Partners IV Korea Ltd. The total amount refunded was KRW 29,256,863,290. Claimants object to the partial nature of the refund and intend to make a separate submission to the Tribunal on that subject, to which the Respondent will respond.

Since sending that update in January 2018, the Parties have yet to provide a further update. Although alluded to at the hearing of 14–15 October 2020, counsel did not provide specifics as to refund’s status, either procedurally or monetarily.; see TD22, 18:4–19:4; TD23, 375:7–18, 397:4–12,433:9–434:5.

⁵⁹⁶ Exhibit CWE-012, [REDACTED] First Expert Report, para. 279. The non-treaty tax rate on dividends was 27.5% in 2008 and 22% for 2009–2011. These tax rates are inclusive of local income tax rates.

⁵⁹⁷ I.N. Kim Witness Statement, para. 5 (“I participated in a periodic tax investigation of KEB which began on May 12, 2012. The NTS conducts periodic tax investigations on a routine basis with respect to all corporate businesses with revenue exceeding a certain threshold set by Corporate Tax Regulations. The KEB investigation covered the period from 2007 to 2011.”).

⁵⁹⁸ I.N. Kim Witness Statement, para. 6 (“Accordingly, our [NTS’s] conclusion in 2012 was that LSF-KEB remained a conduit company for the 2008–2011 period during which the dividend payments were made [by Citibank to LSF-KEB Holdings SCA].”).

460. The Korean Tax Tribunal had already issued a decision on 21 July 2010 rejecting the submissions of LSF-KEB Holdings SCA that it was a Belgian corporation with its principal place of business in Belgium.⁵⁹⁹ Citing a case against Newbridge as precedent, among other authorities, the Tax Tribunal again held that LSF-KEB Holdings SCA was a conduit company established for the purpose of tax avoidance, and, as a conduit company, it was not entitled to the benefits of the Korea-Belgium Tax Treaty. The Tax Tribunal noted that LSF-KEB Holdings SCA had failed to submit evidence on key issues.⁶⁰⁰ LSF-KEB Holdings SCA's case was dismissed as "meritless."⁶⁰¹ There is no evidence before this Tribunal that LSF-KEB Holdings SCA appealed this July 2010 decision. The NTS used these findings of fact when it began its May 2012 audit of Citibank.
461. The Citibank case ultimately went to Korea's Supreme Court in 2017.⁶⁰² The Korean Supreme Court observed that the lower court's conclusion to apply the general domestic

⁵⁹⁹ Exhibit R-176, Tax Tribunal Judgment, July 2010.

⁶⁰⁰ Exhibit R-176, Tax Tribunal Judgment, July 2010; specifically, on pp. 9-10, the Tax Tribunal concluded:

In addition, as for the conduit company, it is not that the resident status under the Korea-Belgium Tax Treaty is denied in its entirety. Rather, the conduit company is to be denied the benefits under the Korea-Belgium Tax Treaty, where it is found to have been established for the purpose of tax evasion (Gukshim 2007Jeon4733 dated 24 February 2009; hereinafter the same). In the present case, Claimant has failed to submit documents evidencing that Claimant has carried out investment activities as KEB shareholder or that the office located in Belgium has conducted business. Furthermore, under the circumstances, it is difficult to recognize that Claimant has held actual control, such as the right to dispose of KEB shares for the Share Transfer Price. As such, Claimant is regarded as a conduit company established for the purpose of tax exemption in respect of overseas income. Accordingly, it is difficult to find that Claimant is a resident of Belgium under the Korea-Belgium Tax Treaty. [emphasis added]

⁶⁰¹ Exhibit R-176, Tax Tribunal Judgment, July 2010, p. 10 ("We find that the Claim made by Claimant in the Appeal to the Tax Tribunal in the present case is meritless.").

⁶⁰² Exhibit R-591, Supreme Court of Korea, Case No. 2017Du59253, Judgment, 28 December 2017 ("Supreme Court Judgment, December 2017"). The lower court based this conclusion on five findings of fact (see pp. 5-6):

1. At the time of the share acquisition, Belgium was known as a jurisdiction used for its tax exemptions, specifically the non-taxation of capital gains under the Korea-Belgium Tax Treaty. The OECD listed Belgium on a "Gray List" of countries which promised compliance with international tax standards.
2. Lone Star Fund IV incorporated the Belgian SCA days before the share purchase agreement to obtain the Korea-Belgium Tax Treaty capital gains exemption.
3. Although the SCA was named party in the share purchase agreement and subsequent share sale agreement, these contracts were based on Lone Star Fund IV's control with investment funds coming from the "Upper-Level Investors,"

rate was based on several findings of fact, including “[t]he SCA has no employee[s] and has spent [nothing on] wages, rents and payments for supplies ... Ninety nine percent of its assets is comprised of the Shares with the remaining 1% being accounts payable and cash related to the invested companies, and it shared its address with the other Belgian entities of Lone Star Fund [sic].”⁶⁰³ The Korean Supreme Court found no error in the findings of the lower court and proceeded to apply the Substance Over Form doctrine found in Article 14(1) of the FANT.

462. According to the Supreme Court, it was “difficult to accept the argument that the Plaintiff [Citibank] could not have known that the SCA was not the substantive owner of the Dividend Income, despite having faithfully investigated the substantive owner in the process of paying the Dividend Income.”⁶⁰⁴
463. The Claimants rely on the Additional Facility award in *Cargill v. Mexico* which dealt with the taxation of high fructose corn syrup (“HFCS”). In that case, all of Mexico’s HFCS producers were U.S.-owned companies, while cane sugar was produced by Mexican-owned companies and by Mexican government-owned sugar mills. Mexico introduced a 400% tax on HFCS.⁶⁰⁵ The *Cargill* tribunal found that Mexico’s actions were “expressly intended to injure” U.S.-owned HFCS producers and suppliers and remove the claimant

i.e., officers from Lone Star Fund IV who controlled the SCA, namely, Messrs. [REDACTED] [REDACTED] [REDACTED] and [REDACTED]

4. The SCA has no employees and spent nothing on wages, rents, or payments for supplies. Ninety nine percent of its assets are shares in KEB while the remaining 1% are accounts payable and cash related to invested companies. Its address in Belgium is the same as other Lone Star Fund entities.
5. The Upper-Level Investors use the SCA only to optimize their investment structure. The SCA had no other business objectives or activities other than as a holding company for Lone Star Fund IV. The SCA was “merely a medium” for the Upper-Level Investors to receive dividend income. The SCA was not the substantial owner of the dividend income. [emphasis added]

⁶⁰³ Exhibit R-591, Supreme Court Judgment, December 2017, pp. 5-6 [emphasis added].

⁶⁰⁴ Exhibit R-591, Supreme Court Judgment, December 2017, p. 10.

⁶⁰⁵ Memorial, para. 534, citing Exhibit CA-257, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (“*Cargill v. Mexico*”), paras. 105-107.

from the Mexican market.⁶⁰⁶ Mexico's "intentionally targeted"⁶⁰⁷ actions "all but annihilated a series of investments."⁶⁰⁸

464. The Respondent contends that application of the "general Korean domestic tax rate" to the funds held by Citibank did not intentionally target the Claimants, nor was the application of the general domestic rate "intended to injure" the Claimants. Although profits may have been less than hoped for, the investment was not "all but annihilated."
465. As with the other tax claims, the issues were fully litigated by Lone Star in the Korean courts. In the absence of any claim to denial of justice, the Claimants have not established any breach of the 2011 BIT on this branch of their case.

(5) Tax on the 2012 Sale of the Remaining Shares in KEB

466. On 18 January 2012, Hana received a letter titled "Notice of the obligation to withhold tax on gains from the alienation of shares by a foreign corporation" from the NTS's Seoul Regional Tax Office. The NTS warned that Hana should withhold capital gains tax from the sale price of the KEB shares before payment of the balance to LSF-KEB, as in the NTS's view, neither the Korea-Belgium Tax Treaty nor any other tax treaty was applicable.⁶⁰⁹
467. Hana did so. LSF-KEB concluded that it would have to accept (temporarily) the NTS's holdback requirements. In the circumstances, LSF-KEB agreed that Hana would hold back over KRW 430 billion from the amount payable at closing and pay such amount to the NTS, leaving LSF-KEB to pursue a refund after the sale.⁶¹⁰ Hana paid the withholding

⁶⁰⁶ Exhibit CA-257, *Cargill v. Mexico*, para. 299.

⁶⁰⁷ Exhibit CA-257, *Cargill v. Mexico*, para. 303.

⁶⁰⁸ Exhibit CA-257, *Cargill v. Mexico*, para. 300.

⁶⁰⁹ Exhibit C-361, Letter from SRTO to Hana, 18 January 2012.

⁶¹⁰ Exhibit C-151, Letter from LSF-KEB to Hana, pp. 2-3.

taxes to the tax authorities on 5 March 2012,⁶¹¹ and LSF-KEB sought a refund in the Korean courts.⁶¹²

468. In a decision dated 11 July 2017, the Supreme Court of Korea dismissed the appeal of LSF-KEB on the now familiar grounds of Substance Over Form.

The Tribunal's Rulings on the Claimants' Specific Tax Objections

469. In the absence of any claim of denial of justice, the Claimants have not established any violation of the 2011 BIT in respect of the post-27 March 2011 tax treatment of their investments. Their various arguments based on Substance Over Form were properly analysed by the Korean courts to whom the Claimants had remitted the questions and the Claimants' objections were rejected for reasons with which the Tribunal agrees. In other words, in the Tribunal's view, the tax treatment violated neither national nor international standards and as such there is no wrongful act capable of supporting the Claimants' arguments on expropriation,⁶¹³ Full Protection and Security, the Umbrella Clause, or the provision for Free Transfers. The Respondent acted well within the legal boundaries of internationally-accepted tax policy.
470. The Claimants have not established that they are victims of arbitrary or discriminatory tax treatment. The essential argument of the Claimants is that Korea did *not* apply Substance Over Form in the analogous cases of Newbridge and Carlyle, which were also accused of adopting an "Eat and Run" *modus operandi* and that the only change of circumstance was the rise of public anger over the "Eat and Run" investors after Newbridge and Carlyle had made their exit. The NTS raided both Carlyle and Newbridge along with Lone Star and others in mid-April 2005.

⁶¹¹ Exhibit R-218, Receipt of Payment from Hana Financial Group Inc., 5 March 2012 (the withholdings were 10% of the transaction, or KRW 391,560,779,680).

⁶¹² Exhibit C-743, Application for Redetermination of Tax Base and Tax Amount of LSF-KEB, 9 May 2012; Witness Statement of Dong Hoon Kang, 19 March 2014 ("D.H. Kang Witness Statement"), para. 7.

⁶¹³ See Reply, paras. 1450 *et seq.*, in which the Claimants argue that the Respondent "expropriated Claimants' rights under the Tax Treaty by means of confiscatory tax measures." See also Rejoinder, paras. 1277 *et seq.* in which the Respondent opposes the allegation that the NTS expropriated the Claimants' investment on the grounds that "Lone Star did not possess any 'rights' under the Tax Treaty" and "[e]ven if Claimants had a proprietary right not to be taxed under the Tax Treaty, Korea's non-application of Tax Treaty benefits did not substantially deprive Claimants' of the use and enjoyment of their investment."

i) Arbitrary Treatment

471. As noted above, the application of Substance Over Form was not arbitrary. The “Substance Over Form” doctrine in a rational public policy and on the facts found by the Korean Courts (and not persuasively challenged in this arbitration) the application was consistent with this policy and the applicable law.

ii) Discriminatory Treatment

472. In terms of discrimination, however, the Claimants’ assert that neither Carlyle nor Newbridge paid tax on the proceeds of their bank investments. This assertion rests on testimony in the Witness Statements of Messrs. [REDACTED] and [REDACTED].⁶¹⁵ Neither witness provides any factual evidence for these assertions.

473. The Claimants have not led sufficient evidence on the Carlyle situation to enable the Tribunal to verify its tax treatment, but as to Newbridge, the known facts do not support the Claimants’ assertion. The record includes a Supreme Court decision dated 11 July 2013 which applies the Substance Over Form doctrine in respect of Newbridge’s sale of Korea First Bank.⁶¹⁶

474. Newbridge structured its sale of Korea First Bank using a corporation based in Labuan, Malaysia – KFB Newbridge Holdings (Private) Limited.⁶¹⁷ The Malaysian corporation was 100% owned by a holding company based in the Cayman Islands – KFB Newbridge Cayman Holdings Co. In turn, that holding company was 100% owned by a Cayman

⁶¹⁴ Exhibit CWE-007, [REDACTED] First Witness Statement, para. 24. See also Memorial, para. 143 (“Moreover, like Carlyle and Newbridge, no Korean tax was due on the gain Star Holdings realized on the sale, due to the applicability of the Korea-Belgium Tax Treaty (this is discussed in detail later).”).

⁶¹⁵ Exhibit CWE-006, [REDACTED] First Witness Statement, para. 20 (“Two private equity funds—The Carlyle Group and Newbridge Capital—had recently exited their investments in Korean banks with large profits and without paying taxes on the sales, which had left the Korean public outraged and determined to prevent us from leaving in the same way.”).

⁶¹⁶ Exhibit RA-235, Supreme Court of Korea, Case No. 2010Du20966, Judgment, 11 July 2013.

⁶¹⁷ Note: Korea blacklisted Labuan, Malaysia as a tax haven; see Exhibit C-663, “Korea to tax Labuan-based foreign investors,” *Financial Times*, 29 June 2006 (“South Korea’s finance ministry on Thursday declared Labuan a tax haven, allowing Seoul to apply domestic tax laws to capital gains on foreign investments made through the Malaysian island, despite the existence of double taxation treaties.”).

Islands limited partnership – KFB Newbridge Investment LP. The limited partnership was made up of 281 investors.

475. Using the Substance Over Form principle, the NTS found that the Malaysian corporation and the Cayman Islands holding company existed only for the purpose of tax avoidance, and should therefore be disregarded. The NTS levied both personal and corporate income tax on the 281 investors in the Cayman Islands limited partnership.
476. Korea's lower courts upheld the NTS's application of the Substance Over Form rule. The Korean Supreme Court, however, only partially agreed. Korea's highest court found that the Substance Over Form principle applied to both the Malaysian corporation and the Cayman Islands holding company, but noted the failure of the lower courts and the NTS to consider the legitimacy of the Cayman Islands limited partnership, thereby missing the crucial final step in the analysis.⁶¹⁸ The Supreme Court cited Lone Star's victory in the January 2012 case about the Star Tower sale for the principle that limited partnerships are taxed as corporations and not as individuals.⁶¹⁹

The Tribunal's Ruling on Arbitrary or Discriminatory Treatment

477. In the Tribunal's view, the Claimants have not established arbitrary or discriminatory treatment. It appears that Newbridge and Lone Star were similarly treated. Newbridge's Cayman Islands limited partnership was found to be in the same tax position as LSF III (U.S.) and LSF III (Bermuda), which were the Lone Star entities that were ultimately assessed at corporate rates.
478. In any event, it is not open to Lone Star to limit the relevant "comparator" group to itself plus Newbridge (if the facts had warranted) and Carlyle (if the facts were known) any more than it would be open to the Respondent to limit the "relevant comparator group" to Lone

⁶¹⁸ Newbridge provided evidence showing that the limited partnership had outside directors and was an independent profit-making organisation that had a distinctive business purpose. In contrast to the other two conduit entities, the limited partnership had not been created solely for the purpose of tax avoidance. Consequently, the NTS should have taxed the limited partnership rather than the limited partnership's 281 investors.

⁶¹⁹ Exhibit RA-235, Supreme Court of Korea, Case No. 2010Du20966, 11 July 2013, pp. 3-4.

Star and LaSalle (and, it seems, the Newbridge Cayman Island Limited Partnership), who were taxed on the basis of Substance Over Form.⁶²⁰

⁶²⁰ Exhibits CA-639 / RA-213, Supreme Court of Korea, Case No. 2010Du1948, Judgment, 26 April 2012. The LaSalle facts closely resemble Lone Star. LaSalle, like Lone Star, litigated the "Substance Over Form" assessment through the courts with no success.

| | Lone Star | LaSalle |
|---|---|---|
| <i>Situs</i> of LPs | U.S., Bermuda | UK |
| <i>Situs</i> of SCA/S.à.r.L. | Belgium, Luxembourg | Belgium, Luxembourg |
| Address of Seoul income property | Yeoksam-dong 737 Kangnam-gu, Seoul Star Tower Building | Jeokseon-dong 66 Jongno-gu, Seoul Jeokseon Hyundai Building |
| Purchasers | Lone Star Fund III (U.S.), L.P. Lone Star Fund III (Bermuda), L.P. | LaSalle Asia Recovery International I L.P. (UK) LaSalle Asia Recovery International II L.P. (UK) |
| Belgian / Luxembourg entities established | 14 June 2001 (Belg.) 14 February 2003 (Lux.) | 10 December 2001 (Belg.) 22 January 2002 (Lux.) |
| Date of purchase | 21 June 2001 | 7 December 2001 |
| Type of business structure used in Belgian / Luxembourg | SA, later SCA/S.à.r.L. | SCA/S.à.r.L. |
| Korean securitization company | C&J Trading Co. (renamed Star Tower Corp.) | LARF Northgate |
| Korean securitization company established | June 2000 | 1 February 2002 |
| Method of holding title to office tower | Shareholding | Shareholding |
| Alleged permanent establish of shareholder | Belgium | Belgium |
| Method of conveying title | Sale of shares | Sale of shares |
| Purchaser of shares | Reco Kangnam Pte. Ltd. and Reco KBD Pte. Ltd. (Government of Singapore Investment Corporation) | Prudential Assurance Company Limited (UK) |
| Closing date for sale of shares | 28 December 2004 | 9 September 2004 |

479. The first step in a discrimination analysis is to identify the group of individuals said to be similarly situated but amongst whom some are alleged to have been differently treated to their disadvantage. The Claimants invite comparison between themselves, Newbridge and Carlyle but in light of the LaSalle and Newbridge decisions, the Claimants have not established discriminatory tax treatment.⁶²¹ The tax treatment of Newbridge and LaSalle contradicts the Claimants' complaint about being singled out for discriminatory treatment. Moreover, the Claimants have failed to establish a larger universe of taxpayers that would, if it exists, support their contention of discrimination. What the analysis shows is that the application of Substance Over Form is very fact dependent. The facts here reasonably

| | | |
|--|---|---|
| Date of SCA liquidation | 31 March 2005 | — |
| Capital gains withheld | 0.00 | 0.00 |
| Tax Treaty cited as basis for no capital gains payable | Korea-Belgium Tax Treaty | Korea-Belgium Tax Treaty |
| Article of Tax Treaty relied on | Art. 13(3) | Art. 13(3) |
| Substance Over Form | Yes | Yes |
| Korean Supreme Court determination | Belgian entities mere conduits for the sole purpose of avoiding capital gains | "It is difficult to consider that the Belgian companies in this case are conducting substantial business activities in Belgium. Evidences proffered to the Court neither shows a business purpose of the established companies other than a tax avoidance purpose that utilizes Article 13(3) of the Korea-Belgium Tax Treaty, nor an independent economic benefit deriving from the investment in real properties of this case." |
| Date of Seoul Administrative Court verdict | 16 February 2009 | 26 June 2009 |
| Date of Korean Supreme Court rulings | 27 January 2012, 15 December 2016 | 26 April 2012 |

⁶²¹ Exhibit RA-235, Supreme Court of Korea, Case No. 2010Du20966, Judgment, 11 July 2013 (concerning Newbridge); Exhibit CA-119 / RA-376, Supreme Court of Korea, Case No. 2010Du5179, Judgment, 26 April 2012 (concerning LaSalle).

support the conclusion of the Korean courts that this was a proper case for its application. In the absence of a claim to denial of justice, the tax discrimination claim is rejected.

iii) *Claim to Full Protection and Security*

480. The Claimants also rely on Article 2(2) of the 2011 BIT which provides that the Claimants' investments in Korea "shall enjoy full and continuous protection and security in [Korean] territory."⁶²² This includes, the Claimants argue, a stable business environment, as well as protection against commercial and legal harassment including improper tax harassment that impairs the normal functioning of the investor's business.⁶²³ However in the Tribunal's view, the tax treatment of the KEB dividends and the withholding tax on the sale to Hana and the tax on the sale to Hana of the KEB shares did not amount to harassment but was a routine application of a tax system whose relevant provisions were quite consistent with international standards including the OECD Guidelines.

iv) *Failure to Observe Obligations with Respect to the Claimants' Investments (Umbrella Clause)*

481. Article 10 of the 2011 BIT provides:

*Each Contracting Party shall observe any other written obligation that may have entered into force with regard to investments in its territory by investors of the other Contracting Party.*⁶²⁴

482. The purpose of such a clause, according to the Claimants, is to ensure compliance with the terms of contracts and other commitments assumed by the host State under the umbrella of the treaty's protection, independently of whether a violation of the treaty's other substantive provisions has occurred.⁶²⁵

483. The Claimants ground their "Umbrella Clause" claim on the alleged failure of the Respondent to comply with its obligations under the Korea-Belgium Tax Treaty, in

⁶²² Exhibit C-001, 2011 BIT, Art. 2(2).

⁶²³ Memorial, paras. 607-609, citing, *inter alia*, Exhibit CA-015, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 2 August 2007, para. 7.4.15; Exhibit CA-006, *Biwater Gauff v. Tanzania*, para. 730.

⁶²⁴ Exhibit C-001, 2011 BIT, Art. 10(3).

⁶²⁵ Memorial, para. 645; Exhibit CA-064, C. Schreuer, "Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road" in 5 *Journal of World Investment and Trade* (2004), p. 250.

violation of Article 10(3) of the 2011 BIT.⁶²⁶ Specifically, the Respondent is said to have failed to observe its obligations (i) under Article 13 of the Tax Treaty not to impose taxes on the Claimants' capital gains in Korea and (ii) under Article 10 of the Tax Treaty not to impose taxes in excess of the specified treaty rates on the Claimants' dividends from their Korean investments.⁶²⁷

484. The Respondent argues that reliance on the Korea-Belgium Tax Treaty is contrary to the ordinary meaning and purpose of Article 10(3) of the 2011 BIT and would represent an unprecedented expansion of the Umbrella Clause.⁶²⁸ In its view, the Tax Treaty between Korea and Belgium is a State to State instrument that does not constitute a "written obligation" owed to the Claimants, nor is it an obligation "with regard to investments" at issue in the case.⁶²⁹
485. The Respondent says the words "Written Obligation" in the Umbrella Clause of the 2011 BIT refer to a private law obligation under a contractual or other personal written commitment to the Claimant. The intent of the Contracting Parties to the 2011 BIT, according to the Respondent, was to limit the application of the Umbrella Clause⁶³⁰ not to incorporate "violations of an entirely different kind of treaty, particularly a Double Taxation treaty."⁶³¹

⁶²⁶ Memorial, pp. 312-317.

⁶²⁷ Specifically, (a) the obligations are "written," "in force," and relate to an investment in its territory by Belgian investors; (b) the relevant provisions of the Tax Treaty have remained textually unchanged for over 30 years and in force since 1996; (c) the Respondent's commitments in the Tax Treaty relate to an investment in its territory by Belgian investors; (d) in Article 10(2) of the Tax Treaty, the Respondent agreed to refrain from taxing dividends paid by Korean companies to Belgian residents; and (e) finally, the overlapping object and purpose of the two treaties further reinforces the view that the Respondent undertook these obligations with respect to investments in its territory by Belgian investors.

⁶²⁸ See Rejoinder, para. 1285.

⁶²⁹ Rejoinder, paras. 1286, 1288 and Reply, para. 924. According to the Respondent, none of the Claimants has standing to assert claims under the Umbrella Clause for breach of the Tax Treaty because they are either unprotected by the Tax Treaty or were not harmed by the NTS measures that are alleged to have breached the Tax Treaty. As acknowledged by the Claimants, Korea "did *not* tax Claimants...and instead taxed the upper-level Lone Star entities." The Respondent says, "it is not remotely clear how Korea's decision *not* to tax the Claimants possibly could give rise to liability by Korea to the Claimants for a violation of the BIT's umbrella clause."

⁶³⁰ J.K. Jeong Statement, paras. 46-47 ("MOFA, had no authority to expand or extend the scope of rights under tax-related treaties, and understood that the BIT and a Double Taxation treaty regulated totally different content.").

⁶³¹ Rejoinder, para. 1300.

The Tribunal's Ruling on the Umbrella Clause

486. The Tax Treaty has its own enforcement mechanisms and neither Party to the Treaty agreed to bring enforcement within the scope of investor-State arbitration.
487. In any event, the Claimants thoroughly litigated their tax position in the Korean courts under a process which even the Claimants' own tax expert says provides fair and impartial justice.⁶³² Thus the Tribunal concludes that even if the Claimants could bring their tax claim within the Umbrella Clause, it would fail on the facts.

v) Other Complaints re: Tax Treatment

488. In the Tribunal's view:
- (a) the normal duty to pay taxes does not amount to expropriation; and
 - (b) the Claimants never had a right to patriate free of tax their dividends and the proceeds of the sale of KEB shares.
489. In summary, the Tribunal rejects the Claimants' tax claims as lacking any persuasive factual or legal foundation.

VIII. LONE STAR'S ALLEGATIONS OF MISCONDUCT AGAINST THE FSC

490. The Respondent acknowledges that "the relevant test is whether denial of approval was an abuse of discretionary authority."⁶³³
491. The Claimants allege that the FSC was motivated by an improper and irrelevant purpose, namely to appease public opinion, and in pursuit of its own political interest:

⁶³² TD13, 3622:17-20.

⁶³³ Rejoinder, para. 623, referring to Second Expert Report of [REDACTED] and [REDACTED] 16 January 2015 ("[REDACTED] Second Expert Report"), para. 56.

- (a) the FSC disregarded administrative time limits in refusing to address the Hana application for approval;⁶³⁴
- (b) there was no justification for the "Wait and See" policy;
- (c) the FSC improperly intervened in private contractual arrangements between LSF-KEB and Hana to force Lone Star to accept a price reduction;
- (d) the FSC improperly pressured KEB to refuse to pay the December 2011 dividend to which LSF-KEB says it was entitled; and
- (e) the FSC did so for an improper purpose amounting to an abuse of power.

A. THE FSC PRESSURED HANA TO FORCE LONE STAR TO ACCEPT A NET USD 433 MILLION PRICE REDUCTION

492. The Respondent argues that it was Hana, not the FSC, that believed a lower sale price might ease public and political resistance to the deal and says the price reduction resulted from Hana's own perception of commercial advantage presented by (i) Lone Star's conviction;

⁶³⁴ As discussed earlier, the Claimants assert that the FSC failed to act on Hana's application within the requisite time limits, claiming that "the FSC was required to complete its review within a maximum period of ... 180 days for the Hana deal" (Memorial, para. 514). Since 1998, according to the Claimants, the FSC has approved 11 applications for Excess Shareholding Approval under the *Banking Act* and the *Financial Holding Companies Act*. Each application was approved within two months of the date it was submitted. In several cases, approval came sooner, often within the first month. There is, Claimants say, no precedent for delays beyond 60 days (the original 30-days plus one renewal period), much less delays lasting nine months (the unapproved HSBC transaction) or thirteen months (the Hana transaction) (Memorial, para. 220). **The relevant review period for applications under the *Financial Holding Companies Act* is set forth in the *Standards for Review of Civil Applications* published by the Ministry of Public Administration and Security. The time period for preliminary approval is 60 days, and the time period for definitive approval is an additional 30 days. The Respondent claims these time limits are not mandatory but directory ("hortatory").** In any event, the Respondent says, the relevant calculation is not the number of calendar days between the filing date for an application and the approval date. The processing period for reviewing an application under the *Financial Holding Companies Act* as under the *Banking Act* can be tolled (*i.e.*, suspended) for various reasons including outstanding requests for relevant information from the applicant, Hana; see Counter-Memorial, para. 366; Y.J. Kim First Expert Report, paras. 70-76; [REDACTED] First Expert Report, paras. 88-89. In addition, the Respondent argues that the calculation must differentiate between Hana's original application of 13 December 2010 and the application dated 5 December 2011 for which, the Respondent argues, a separate calculation is required. The Respondent argues, for example, that the first application was tolled pending review by the Fair Trade Commission, and again pending receipt of additional information requested of Hana, and pending resolution of legal uncertainty associated with the Stock Price Manipulation Case; see Counter Memorial, paras. 367-368; [REDACTED] First Expert Report, paras. 47, 96; **Exhibit C-241 / R-092**, FSC Briefing on KEB, 12 May 2011.

(ii) the FSC's resulting sale order; and (iii) the deteriorating economy.⁶³⁵ Hana acted on its own interest, not as the FSC's "servant."

493. The Respondent filed evidence from FSC officials denying any communication to Hana about renegotiating the price of its private agreement with Lone Star or about the political situation in Korea.⁶³⁶

494. On 28 October 2011, Hana Chairman ██████ sent an email to Lone Star Chairman ██████ advising of the existence of "increasing voices" among labour unions, civic organisations, and politicians arguing for a "punitive forced sale by Lone Star," which, the Hana Chairman claimed, Hana thus far had successfully opposed. Hana and Lone Star would have to "submit a new contract," because the existing contract had not been "entered in accordance with the [Disposal] order" and "[i]n submitting a new contract, we should find a way to alleviate political pressure on FSC in approving the transaction, especially by [a reduced price] reflecting market valuation and turbulent financial industry."⁶³⁷ However, according to the Hana Chairman's First Witness Statement:

*To be clear, these were all Hana's ideas. I did not discuss the content of this email with anyone at the FSC or the FSS [...] I did not take any requests or orders from the government in renegotiating the SPA with Lone Star.*⁶³⁸

⁶³⁵ Counter-Memorial, para. 344; ██████ First Witness Statement, paras. 13-14.

⁶³⁶ Counter-Memorial, para. 344; Witness Statement of Joo Hyung Sohn, 21 March 2014 ("J.H. Sohn First Witness Statement"), para. 19; Witness Statement of Seok Dong Kim, 20 March 2014 ("S.D. Kim First Witness Statement"), paras. 18-19:

As I explained above, one of the guiding principles as FSC Chairman was that the FSC should not interfere in the price setting function of the market. Consistent with that principle, I never – at any time – gave any instruction to anyone at the FSC regarding the price for Hana's acquisition of Lone Star's shares or regarding political opposition to the transaction. I at no time heard of anyone at the FSC having incited or forced Hana to renegotiate the price of its existing agreement with Lone Star, and I believe that no one at the FSC tried to violate the non-interference principle, which I repeatedly emphasized.

See also Second Witness Statement of ██████ 16 January 2015 ("█████ Second Witness Statement"), para. 7 ("There was no direct or indirect discussion with the FSC or the FSS of any revision to the share price for the KEB shares, as Lone Star has alleged.")

⁶³⁷ Exhibit C-262, Email from ██████ to ██████ 28 October 2011.

⁶³⁸ ██████ First Witness Statement, para. 19.

495. Lone Star's Mr. [REDACTED] testified he was told by Hana's Deputy President, Mr. [REDACTED] that the FSC had asked Hana to approach Lone Star to renegotiate the price of the parties' contract downward.⁶³⁹ Mr. [REDACTED] denies the allegation.⁶⁴⁰
496. Hana Chairman [REDACTED] wrote another letter to Mr. [REDACTED] on 11 November 2011 seeking a significant price reduction.⁶⁴¹ This was followed by a meeting between Mr. [REDACTED] and Mr. [REDACTED] in London.⁶⁴² Mr. [REDACTED] testified that he tried, in various ways, to convey the Hana position that although the FSC had never discussed the issue of the sale price with Hana, Hana nevertheless believed that lowering the price would ease pressure on the FSC.⁶⁴³
497. On 14 November 2011, Hana submitted a status report to the FSC. Hana stated that it notified Lone Star that "in view of the political climate in Korea, the changes to the legal status of Lone Star after the [July] execution of the SPA Amendment and the recent changes to the environment of the financial markets, there is a need to change some of the terms and conditions of the SPA (including the proposal to reduce the existing purchase price), and HFG [Hana] is promoting discussions thereon."⁶⁴⁴ The Respondent denies that this initiative was orchestrated by the FSC.⁶⁴⁵
498. At its regularly scheduled meeting on 18 November 2011, the FSC directed Hana to submit a new application and issued a notice to Hana to that effect.⁶⁴⁶ The Respondent emphasises that the FSC requested a new *application*, not a new agreement. According to the

⁶³⁹ Memorial, para. 294; **Exhibit C-263**, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011.

⁶⁴⁰ [REDACTED] First Witness Statement, para. 14 ("I understand that Lone Star has alleged that the FSC pressured Hana to seek a price reduction. That is simply not true. The FSC never asked or pressured me to renegotiate the price terms with Lone Star.")

⁶⁴¹ [REDACTED] First Witness Statement, para. 21; **Exhibit R-117**, Letter from [REDACTED] to [REDACTED] 10 November 2011.

⁶⁴² [REDACTED] First Witness Statement, para. 23.

⁶⁴³ [REDACTED] First Witness Statement, para. 23; *see also* **Exhibit C-268**, Transcript of Meeting Between Lone Star and [REDACTED] November 2011 ("**Lone Star- [REDACTED] Meeting Transcript**"), p. 3.

⁶⁴⁴ **Exhibit C-271**, Hana Financial Group, Report to FSC on Status of KEB Share Purchase Agreement, 14 November 2011 ("**Hana's Report on KEB SPA Status**"). *See also* [REDACTED] First Witness Statement, para. 21.

⁶⁴⁵ Counter-Memorial, para. 352.

⁶⁴⁶ **Exhibit R-091**, Notification of Response to Hana Financial Group Application, 18 November 2011; J.H. Sohn First Witness Statement, paras. 21-23.

Respondent, it made little difference to the FSC whether the parties amended the terms of their contract or not.⁶⁴⁷

499. On 25 November 2011, Lone Star and Hana met again in London. Participants from Hana included Chairman [REDACTED] Mr. [REDACTED] and Mr. [REDACTED]. Lone Star was represented by Chairman [REDACTED] Mr. [REDACTED] and Mr. [REDACTED].⁶⁴⁸
500. The Hana Chairman proposed KRW 11,900 per share as the new sale price, stating that this price reduction was necessary for the transaction to proceed given the legal, political, and economic circumstances.⁶⁴⁹ Mr. [REDACTED] repeatedly asked if the FSC “specifically told [Hana] the price”⁶⁵⁰ at which the FSC would approve the transaction.⁶⁵¹
501. Unbeknownst to the Hana participants, and without their consent,⁶⁵² Lone Star secretly recorded the 11 November 2011 and 25 November 2011 meetings including private discussions between the Hana people and their lawyer.⁶⁵³

⁶⁴⁷ The price term of the parties’ contract was not entirely irrelevant, given the impact that the price could have on Hana’s soundness, which is a factor the FSC is required to consider. Within the range of prices that would not materially harm Hana’s soundness, however, the FSC as a matter of principle and policy did not interfere with the private agreement of the parties regarding price. See S.D. Kim First Witness Statement, paras. 18-20.

⁶⁴⁸ [REDACTED] First Witness Statement, para. 26.

⁶⁴⁹ [REDACTED] First Witness Statement, para. 21.

⁶⁵⁰ **Exhibit C-228**, Transcript of Meeting Between Lone Star and Hana Representatives, 25 November 2011 (“**Transcript of November 2011 Meeting**”), p. 3.

⁶⁵¹ **Exhibit C-228**, Transcript of November 2011 Meeting, pp. 5-6, 8.

⁶⁵² [REDACTED] First Witness Statement, para. 21; [REDACTED] First Witness Statement, paras. 20-21; [REDACTED] First Witness Statement, para. 24.

⁶⁵³ **Exhibit C-228**, Transcript of November 2011 Meeting, pp. 15 *et seq.* The Respondent says the recording of “without prejudice” negotiations violated Article 10.2 of the December 2011 Hana SPA, which prescribes that the parties must “treat as strictly confidential and not disclose or use any information received or obtained [from the negotiations relating to] [the SPA]” (**Exhibit C-280**, Amended and Restated SPA Between Lone Star and Hana, Art. 10.2). Moreover, the Respondent says Lone Star’s conduct could be prosecuted as a crime under Korean law, including Articles 3 and 16.1 of the *Protection of Communications Secrets Act* (**Exhibit R-104**, Republic of Korea, *Protection of Communications Secrets Act* (Law No. 9,819, partially amended 2 November 2009)). Article 4 of that Act also forbids a party from producing this type of transcript as evidence in a legal proceeding. The Claimants respond that in the jurisdictions where the two meetings took place and the taping occurred, it was not illegal (Reply, paras. 510-518).

502. Subsequently, the tribunal in the ICC Arbitration concluded (in the absence of any participation by the Korean government) that in fact the FSC had orchestrated the USD 433 million price reduction.⁶⁵⁴

B. THE FSC IMPROPERLY PRESSURED KEB TO REFUSE TO DECLARE THE DECEMBER 2011 DIVIDEND TO WHICH LSF-KEB SAYS IT WAS ENTITLED

503. The Claimants allege that “after Hana’s application [was] approved, further FSC-imposed conditions on the closing [came] to light”⁶⁵⁵ and, in particular, “when Lone Star sought to obtain a dividend to which it was rightly entitled, Hana made it clear that the FSC would not let that happen.”⁶⁵⁶

504. According to Lone Star, while negotiating the reduced-price SPA in November 2011, Lone Star and Hana had agreed that, if the sale did not close by 31 December 2011, LSF-KEB would be entitled to its respective share of any year-end 2011 dividend that might be issued in 2012, even after the sale closed, because such dividends are paid to the shareholders of record as of the end of the fiscal year.⁶⁵⁷ As the sale did not close by 31 December 2011, Lone Star stood to benefit from any 2011 financial year dividend declared at the 2012 Annual Shareholders’ Meeting to be held in March 2012.⁶⁵⁸ LSF-KEB was entitled to attend that Meeting and vote its shares (up to the 10% limit imposed by the FSC), in favour of any such dividend.⁶⁵⁹

505. The Respondent relies on the evidence of Mr. [REDACTED] who testified that: “The FSC never demanded any such thing. The fact that the dividend issue was not addressed in full measure in the December 2011 SPA, and the subsequent decision not to pay a large

⁶⁵⁴ Exhibit C-949, ICC Award, para. 252.

⁶⁵⁵ Memorial, Sec. III.J.4.d.

⁶⁵⁶ Memorial, para. 32.

⁶⁵⁷ Exhibit C-228, Transcript of November 2011 Meeting; Exhibit CWE-003, Witness Statement of [REDACTED] 10 October 2013 (“[REDACTED] First Witness Statement”), para. 33.

⁶⁵⁸ Exhibit CWE-003, [REDACTED] First Witness Statement, paras. 33-34.

⁶⁵⁹ Memorial, para. 313; Exhibit CWE-007, [REDACTED] First Witness Statement, para. 77.

year-end dividend, were matters decided by the parties themselves, without interference by the FSC.”⁶⁶⁰

506. The Respondent points out that unlike the original Hana SPA, the December 2011 agreement did not contain any provision guaranteeing Lone Star any level of dividends or equivalent consideration.⁶⁶¹ Lone Star sent a shareholder proposal to KEB on 6 February 2012, requesting that the issuance of a 2011 dividend of 500 Won per share be added to the agenda for the general shareholders’ meeting.⁶⁶² Hana opposed (for its own commercial advantage according to the Respondent) any such dividend as additional consideration to Lone Star above and beyond the purchase price negotiated in the December 2011 SPA.⁶⁶³ Lone Star ultimately agreed to drop the dividend request, and the parties executed a side letter to that effect on the day of the closing.⁶⁶⁴

C. THERE WAS NO JUSTIFICATION FOR A “WAIT AND SEE” DELAY UNTIL VERDICTS WERE REACHED IN THE KEB CARD STOCK MANIPULATION CASE

507. The Claimants argue that the FSC “should ... have approved HSBC’s application promptly after receiving it,”⁶⁶⁵ that there was no legitimate basis for deferring approval,⁶⁶⁶ and that the reason given by Korea (*i.e.*, the need for resolution of legal uncertainty) was merely “a cover for the FSC to cope with various political pressures by doing nothing.”⁶⁶⁷ This is evident, they say, from the fact the FSC finally approved the transaction despite the convictions of some of the Claimants’ people in the Stock Price Manipulation Case. As the Claimants observe:

The ultimate irony, of course, at least with respect to Lone Star’s attempts to sell its shares in KEB, was that despite the many protestations over many years that legal uncertainty made it impossible for the FSC to approve HSBC’s or Hana’s applications to acquire Lone Star’s shares in

⁶⁶⁰ ██████████ First Witness Statement, paras. 30-31; *see also* ██████████ First Witness Statement, para. 26.

⁶⁶¹ ██████████ First Witness Statement, para. 28; **Exhibit C-250**, Second Amendment to SPA Between Lone Star and Hana.

⁶⁶² **Exhibit C-292**, Shareholder Proposal from LSF-KEB Holdings SCA to Korea Exchange Bank, 6 February 2012.

⁶⁶³ ██████████ First Witness Statement, para. 30.

⁶⁶⁴ **Exhibit C-151**, Letter from LSF-KEB to Hana, 9 February 2012, p. 3.

⁶⁶⁵ Reply, para. 309.

⁶⁶⁶ Reply, Sec. III.B.1.c(i).

⁶⁶⁷ Reply, para. 170.

*KEB, none of that alleged legal uncertainty made any difference to the final outcome [...]. The FSC did not issue an order for Lone Star to sell its shares on the open market. It did not label Lone Star an NFBO. It did not cancel its approval of Lone Star's original acquisition of shares in KEB. It did not seek to cancel Lone Star's title to the shares. It ultimately approved Hana's application based on an assessment of Hana's qualifications under the applicable statutory factors.*⁶⁶⁸ [emphasis added]

508. More generally, the Respondent states that the FSC had to balance two separate sources of authority and responsibility whose respective timetables were in conflict with one another: "(i) the authority to supervise the financial sector through activities such as inspections and sanctions (supervisory authority), and (ii) the authority to assess and approve applications relating to, *inter alia*, bank ownership (approval authority)."⁶⁶⁹ The governing statutes, however, "are *silent* on which of these two functions should take priority when they are *in conflict*."⁶⁷⁰ According to the Respondent, the Tribunal should defer to the FSC's procedural decision to "Wait and See."⁶⁷¹ Moreover, procedural decisions taken by the regulators should not be second-guessed by international tribunals.
509. The Respondent contends that given (i) the indictments in connection with Lone Star's initial 2003 investment in KEB of Lone Star's lawyer, two high-level KEB executives, and a Korean government official on charges of bribery, breach of trust, and dereliction of duty, and (ii) with reference to the Stock Price Manipulation Case, Lone Star "put KEB and the entire financial system at risk" by first concealing from the regulators that it intended to let

⁶⁶⁸ Reply, para. 21.

⁶⁶⁹ Second Expert Report of Yong-Jae Kim, 15 January 2015 ("Y.J. Kim Second Expert Report"), para. 101.

⁶⁷⁰ Rejoinder, para. 598, citing Y.J. Kim Second Expert Report; 101 [emphasis original].

⁶⁷¹ Rejoinder, para. 572, referring to **Exhibit C-156**, "FSC put the brakes on Lone Star's early sale plan of its interest in KEB," *Money Today*, 26 June 2007 ("We are evaluating whether Lone Star was qualified to be KEB's majority shareholder," [FSC official, Mr. Hyeok-Se] Gwon said, "If Lone Star sells its shares, we will make a decision on whether to approve such sale comprehensively taking into account the majority shareholder qualification evaluation process and court's decision."); **Exhibit C-473**, "FSC Chairman Jeung-Hyun Yoon, 'It is too early to discuss National Pension Service's acquisition of banks,'" *Money Today*, 5 July 2007 ("The Lone Star issue is under trial. The administration cannot take any measure with respect to the issue for which court proceedings are underway. We will wait for the result of the court proceedings."); **Exhibit R-058**, "HSBC faces 3-year wait in bid for Korean bank; Lone Star case must be resolved first," *International Herald Tribune*, 23 August 2007 ("The Korean Financial Supervisory Commission said Wednesday that any decision on the 4.65 trillion won, or \$4.9 billion, sale of the 51 percent stake owned by Lone Star Funds would have to wait until a legal tussle over the U.S. buyout firm's 2003 acquisition of the bank is settled. That may take three years or more, Lone Star's lawyers said."); **Exhibit C-161**, "FSC, 'It is impossible to approve KEB sale until court decision is out,'" *Yonhap News Agency*, 3 September 2007 ("A trial is going on regarding the KEB sale and manipulation of share prices of Korea Exchange Credit Bank Service. FSC cannot review the approval for HSBC's acquisition of KEB until legal uncertainties relating to the trial are resolved.").

KEB's credit card subsidiary die, and thereafter to engage "in a campaign of wrongful and illegal conduct designed to force the other shareholders of KEB Card out of the company at artificially reduced prices."⁶⁷² It would have been irresponsible of the FSC to turn a blind eye. In particular:

- (a) factual findings in the 2003 KEB Share Acquisition Case might have caused (prompted by the BIA) the FSC to cancel *ex officio* the 2003 approval of Lone Star's excess shareholding or prompted KEXIM to seek nullification or cancellation of its 2003 SPA with Lone Star.⁶⁷³ Either scenario could restrict Lone Star's authority to dispose of the KEB shares in a manner of its own choosing; and
- (b) a conviction in the Stock Price Manipulation Case also could affect Lone Star's authority to sell the KEB shares in a manner of its choosing. If Lone Star were convicted of stock price manipulation, and the conviction became final, the FSC as a matter of law would (and did) need to order Lone Star to dispose of the KEB shares.⁶⁷⁴

510. Korea, according to the Claimants, admitted that "there were no legal barriers to Lone Star disposing of its shares as it saw fit."⁶⁷⁵ In particular:

- (a) an FSC review dated 21 August 2007 stated (in the Claimants' translation) that:
"However, if a potential acquirer pushes ahead with filing an application for

⁶⁷² Rejoinder, para. 509. See also Rejoinder paras. 510 *et seq.*; accordingly, the Respondent argues:

- (a) the Claimants' own conduct gave rise to very serious ethical issues, which the regulators decided could be properly addressed only after the relevant facts were established by the criminal courts;
- (b) it was necessary to resolve the ethical issues first, before allowing "all the eggs to be scrambled" in a sale;
- (c) the regulators gave ample notice of their approach and applied that approach fairly and consistently throughout; and
- (d) the regulators resisted considerable pressure from politicians and public opinion to take earlier and more punitive action against Lone Star.

⁶⁷³ H.S. Lee First Witness Statement, paras. 15-16; [REDACTED] Second Expert Report, para. 66. For example, if the FSC were to cancel the 2003 approval, that would mean that Lone Star could be ordered to dispose of its excess shares, potentially in a manner that would preclude a private sale transaction. If KEXIM obtained nullification or cancellation of the 2003 SPA, it would be as if KEXIM's sale of 80 million KEB shares to Lone Star had never taken place. Without having ever actually received title to those 80 million shares, Lone Star could hardly sell them on to someone else.

⁶⁷⁴ Y.J. Kim First Expert Report, paras. 74-76.

⁶⁷⁵ Reply, para. 55.

approval, delivering an official letter with the intent that the authorities will postpone reviewing the application for approval because the matters are being tried at the court (**there are no legal grounds**)⁶⁷⁶ [the Respondent disputes the translation of “no legal grounds”⁶⁷⁷];

- (b) in September 2008,⁶⁷⁸ the FSC was prepared to approve the HSBC application even though the Stock Price Manipulation Case was still pending;⁶⁷⁹ and
- (c) in January 2012, when the FSC approved Hana’s application the FSC “mentioned Lone Star only in passing,”⁶⁸⁰ which, the Claimants say, indicates that in the end the FSC focused on Hana not Lone Star and that Hana should have been the focus from the beginning.⁶⁸¹

511. The Respondent says the Claimants’ reliance on the situation in September 2008 is misplaced as it falls within the period in which the legal uncertainty was not in play. September 2008 falls between the High Court’s reversal of the defendants’ convictions in the Stock Price Manipulation Case in June 2008 and the Supreme Court’s unexpected reversal of that decision in March 2011, which resulted in the case being remanded to trial. In that period, the legal uncertainty arising from the Stock Price Manipulation Case “receded and was not relevant to the regulators’ decision-making.”⁶⁸² Moreover, the 2003

⁶⁷⁶ Reply, para. 55, n. 40, quoting **Exhibit C-761**, FSC, Review on the Supervisory Authorities’ Direction of Reaction on the Sale of KEB Shares, 21 August 2007, p. 6.

⁶⁷⁷ Rejoinder, para. 641.

⁶⁷⁸ The Claimants argue that the FSC, when “facing the looming global financial crisis, ... made a belated attempt to approve HSBC’s application in 2008” (Reply, para. 101). The Claimants note in this context that “the FSC decided to approve HSBC’s application in *September*, at least a month or more before the FSC could expect a decision in the [2003 KEB Share Acquisition Case]” (Reply, para. 121 [emphasis original]).

⁶⁷⁹ Reply, para. 130; H.S. Lee First Witness Statement, para. 15.

⁶⁸⁰ Reply, para. 320 (asserting that “[b]y that action alone, the FSC acknowledged that the factors relating to the seller were entirely irrelevant, as the FSC dropped all pretext that Lone Star’s circumstances mattered when making its actual determination.”).

⁶⁸¹ Reply, para. 320.

⁶⁸² Rejoinder, para. 645.

KEB Share Acquisition Case had not yielded any significant indication of direct involvement of Lone Star principals in connection with obtaining the original approval.⁶⁸³

512. The Claimants say, "given that the FSC concluded unequivocally that HSBC and Hana met all of the applicable statutory criteria to acquire control of KEB," there "was *never* any doubt that HSBC and Hana were qualified to acquire Lone Star's stake in KEB."⁶⁸⁴ Eventually, the FSC approved the transaction despite the convictions of some of the Claimants' people in the Stock Manipulation Case. In the Claimants' view, the "legal uncertainty" arising from allegations against Lone Star was merely a pretext for delay by the regulators.⁶⁸⁵

(1) The Claimants Denounce the FSC's "Wait and See" Strategy

513. The Claimants argue that only politics, fear of public reaction, and a desire to harm Lone Star can explain why the FSC deferred decision on the HSBC and Hana applications. They reject the possibility that the legal uncertainties could possibly have been resolved in a manner that might complicate the HSBC or Hana acquisition applications or render them moot. According to the Claimants, the delay was nothing more than a "public relations strategy" manufactured by the FSC "to explain its inconsistent behavior" and provide "a cover for the FSC to cope with various political pressures by doing nothing."⁶⁸⁶

514. In the Claimants' view, there was no justification for a "Wait and See" policy because neither the 2003 KEB Share Acquisition Case nor the Stock Price Manipulation Case had anything to do with Lone Star's authority to sell its shares, or the qualifications of HSBC and Hana to acquire them.

515. At this juncture, therefore, a number of issues present themselves:

⁶⁸³ H.S. Lee Second Witness Statement, para. 26. *See also* Exhibit C-208 / R-188, *Byeon* Decision; Exhibit C-188 / R-140, High Court Judgment, Stock Price Manipulation.

⁶⁸⁴ Reply, para. 55 [emphasis added].

⁶⁸⁵ Reply, paras. 3, 14-15, 101, 109.

⁶⁸⁶ Reply para. 170. *See also* Rejoinder, para. 593.

- (a) Did the FSC have a legitimate interest in investigating Lone Star's integrity despite Lone Star's desire to exit Korea altogether?
 - (b) If so, was the FSC justified as a matter of policy in prioritising the alleged criminality of Lone Star ahead of addressing approval of the purchaser(s)?
 - (c) Was the exercise of the FSC discretion to "pause" the Hana approval process tainted by a conflict of interest, *i.e.*, giving priority to its own institutional wish to appease popular and political opposition to "Eat and Run" foreign investors in preference to the discharge of its mandate under the *Banking Act* and the *Financial Holding Companies Act*?
- (2) **The FSC Contends that the Korean *Banking Act* and *Financial Holding Companies Act* Confer on the Regulators the Power to Prioritise the FSC's "Prudential Concerns" Over its Statutory Approval Functions**

516. The Claimants argue that the role of the FSC under the *Banking Act* was narrow and targeted only on the purchaser of banking shares, not the vendor. As stated in the Reply, "[t]he applicable Korean banking laws lay out the specific factors that the FSC must consider when determining a bank acquisition application, and *none of those factors relates to the seller.*"⁶⁸⁷ The Claimants' Korean banking law expert, Professor [REDACTED] asserts that "the relevant question ... is whether *the applicant* is qualified to control the bank," and "it is irrelevant whether the regulators have concerns relating to the seller that is relinquishing its control of the bank."⁶⁸⁸

517. In this regard, the Respondent advocates a more "purposeful" interpretation of the regulatory framework. As a matter of Korean law, the Respondent says, the legislative purpose may be considered when interpreting the relevant portions of the *Banking Act*⁶⁸⁹

⁶⁸⁷ Reply, para. 267 [emphasis original], citing Exhibit CWE-026, Second Expert Report of [REDACTED] 1 October 2014 ("[REDACTED] Second Expert Report"), Secs. I.A-B.

⁶⁸⁸ Exhibit CWE-026, [REDACTED] Second Expert Report, para. 5 [emphasis original].

⁶⁸⁹ Exhibit CA-098, *Banking Act*, Art. 15(3). There are two parts to Article 15(3) of the *Banking Act*: (i) the "main text," and (ii) the "proviso." Thus:

[Main Text of Article 15(3)]

and the *Financial Holding Companies Act*.⁶⁹⁰ The relevant purpose of the *Banking Act* is set out in Articles 1 and 15, *i.e.*, to ensure soundness and efficiency of the banking sector.⁶⁹¹

- (a) “soundness” refers both to the stability of a particular bank and the stability of the entire banking sector as a whole;⁶⁹²
- (b) “efficiency,” for its part, “is a broad concept that refers to various policy-based factors that need to be considered in supervising the banking industry.”⁶⁹³ If the FSC were to look the other way and allow Lone Star to exit the country without full inquiry into its alleged misdeeds, it would send a wrong signal of lax regulation to others engaged in Korean capital markets; and

Notwithstanding the text of paragraph (1) excluding its subparagraphs, the same person may hold stocks of a [bank] with approval of the [FSC] in excess of [each] such limit as set in any of the following subparagraphs: [...proviso...]

1. *The limit as set in the text of paragraph (1) excluding its subparagraphs (the limit as set in paragraph (1) 2 in case of a local [bank]);*
2. *25/100 of the total number of issued voting stocks of the [bank] concerned; and*
3. *33/100 of the total number of issued voting stocks of the [bank] concerned.*

[Proviso of Article 15(3)]

Provided, That the [FSC] may grant approval by fixing separate specified limits of stockholdings, other than the limit as set in each subparagraph only where it is deemed necessary in view of the possible contribution to the efficiency and soundness of the banking business and the stock distribution of stockholders of the [bank], and if the same person intends to hold stocks in excess of the approved limit, he shall obtain additional approval from the [FSC]. [emphasis added]

The Respondent’s experts, Professors [redacted] and [redacted] argue that “the proviso grants the FSC the authority to establish additional limits on shareholdings” ([redacted] First Expert Report, para. 67).

⁶⁹⁰ Y.J. Kim Second Expert Report, paras. 59-65; [redacted] Second Expert Report, paras. 56, 60.

⁶⁹¹ [redacted] Second Expert Report, para. 61 (“Article 1 of the *Banking Act*, which states the public interest goals under the *Banking Act* and the overall purpose of the *Banking Act* (the ‘sound operation of [banks],’ ‘stability of financial markets,’ and ‘contribut[ion] to...the development of the national economy’).”).

⁶⁹² [redacted] Second Expert Report, para. 21.

⁶⁹³ Y.J. Kim Second Expert Report, para. 64. The Respondent’s expert, Professor Y.J. Kim, says since the legislative purpose articulated in Article 1 of the *Financial Holding Companies Act* is to “contribute to the sound development of the national economy,” by, for example, “**promoting the sound operation of financial holding companies,**” it was reasonable for the FSC to monitor the serious criminal proceedings that were ongoing relating to both the seller and the target company, and to prudently wait for a final ruling in the criminal proceeding; *see* Y.J. Kim Second Expert Report, paras. 98 *et seq.*

- (c) even independently of the legislative purpose of a particular statute, Korean law requires regulators in the exercise of a discretionary authority to take into consideration the public interest.⁶⁹⁴

The Respondent says the Claimants wrongly assume that the full scope of supervisory authority has been (and could even be) codified by statute.⁶⁹⁵

518. The Respondent's expert, Professor Y.J. Kim, says "Article 15(5) of the *Banking Act* provides applicable standards for the qualification **of the applicant**, as well as the approval procedure and other necessary matters, to be determined by the Presidential Decree when applying Article 15(3)."⁶⁹⁶ Therefore "[n]egative impacts on the bank's soundness could be originated from seller-driven factors as well as purchaser-driven factors."⁶⁹⁷

519. The Proviso reads as follows:

[Proviso of Article 15(3)]

*Provided, That the [FSC] may grant approval by **fixing separate specified limits of stockholdings** other than the limit as set in each subparagraph only where it is **deemed necessary** in view of the possible contribution to the efficiency and soundness of the banking business and the stock distribution of stockholders of the [bank], and if the same person intends to hold stocks in excess of the approved limit, he shall obtain **additional approval from the [FSC]**.*⁶⁹⁸ [emphasis added]

520. According to the Respondent, "if only the main text is applied without applying the proviso, the financial supervisory authority would be powerless to perform assessment or control when the same person acquires additional shares until it reaches 100%

⁶⁹⁴ Korea's administrative experts, Professors ██████████ state in their Second Report, "It is well established in Korea through court precedents and legal theory" that the financial regulators may deny an approval "based on consideration of the 'public interest.'" For example, in a 10 May 2007 decision, the Supreme Court of Korea expressly held that approval may be denied in consideration of "the need for the public interest." There are a number of other court precedents that echo the Supreme Court's reasoning. **Thus, the relevant test is whether denial of approval was an abuse of discretionary authority.** See ██████████ Second Expert Report, paras. 52-53.

⁶⁹⁵ Rejoinder, para. 601.

⁶⁹⁶ Y.J. Kim Second Expert Report, para. 39 [emphasis added].

⁶⁹⁷ Y.J. Kim First Expert Report, para. 48.

⁶⁹⁸ Exhibit CA-098, *Banking Act*, Art. 15(3).

shareholding.’ ... It is for this reason that the FSC has consistently applied the proviso in connection with applications for one-time acquisitions of control.”⁶⁹⁹

The Tribunal’s Ruling with Respect to the FSC’s “Prudential Role”

521. In the view of the Tribunal majority, the authority for the FSC “prudential role” in its regulatory approval function, to the extent it exists, must come from the general regulatory framework rather than the text of Article 15(3) of the Banking Act. While Professor Y.J. Kim explains how the Article 15(3) proviso works in regulating different limits for the cumulative acquisition of bank shares, the majority of the Tribunal does not accept, on a plain reading of the text and the conflicting expert opinions, that in the circumstances of the Hana purchase the proviso empowered the FSC to concern itself with what the Respondent calls the “moral hazard”⁷⁰⁰ created by Lone Star’s attempted exit from Korea, or authority to impose, e.g., an open market condition on the sale of the “exempt” block of shares.
522. In the Tribunal’s view, the regulatory framework under the *Banking Act* and *Financial Holding Companies Act* permitted the FSC to consider whether the public interest justified a full investigation of Lone Star’s alleged criminal conduct to ensure soundness and efficiency of the banking sector.⁷⁰¹ The Tribunal majority does not accept that that is a correct explanation of what happened in this case.
523. The real question in **this** case, is whether the FSC did in fact “Wait and See” for prudential reasons, as the Respondent alleges, or whether, as the Claimants allege, the delay constituted an abuse of its discretion and had nothing to do with “prudential” concerns but

⁶⁹⁹ Rejoinder, para. 609, citing Y.J. Kim Second Expert Report, para. 28; see also Y.J. Kim Second Expert Report, para. 30 (“In the case of an acquisition of a large bulk of shares that would be in excess of 33% shareholding, that is, enough to control the management of a bank, the FSC and the Financial Supervisory Service (the “FSS”) have been known to apply the proviso of Article 15(3) and set separate shareholding limits. In practice, most of the changes of major shareholders of banks that have taken place after the amendment to the Banking Act in 2002 were understood to have been made pursuant to this proviso.”).

⁷⁰⁰ TD23, 311:9-21.

⁷⁰¹ [REDACTED] Second Expert Report, para. 61 (“Article 1 of the *Banking Act*, which states the public interest goals under the *Banking Act* and the overall purpose of the *Banking Act* (the ‘sound operation of [banks],’ ‘stability of financial markets,’ and ‘contribut[ion] to ... the development of the national economy’).”).

was driven by its conflict of interest in attempting to mitigate the political backlash against Lone Star as an "Eat and Run" investor.

(3) The Tribunal Rejects the Claimants' Position on Administrative Time Limits to Deal with Exemption Applications

524. In the Tribunal's opinion, as noted earlier, the timing of the approval process is more flexible than envisaged by the Claimants. The Korean Supreme Court observed with respect to rules for administrative approval that the processing period "is merely a hortatory provision that encourages the approval process to be conducted as swiftly as possible, and is not a mandatory provision or validity provision."⁷⁰² By any standard, the control of Korea's third largest commercial bank is a major transaction.
525. However, the majority of the Tribunal notes that the relevant applications to the FSC were by HSBC and Hana, not by Lone Star. It was open to HSBC or Hana to apply for judicial relief from administrative inaction,⁷⁰³ but there is no evidence either did so.
526. More importantly, the issue is not simply delay but improper motive for the delay. The Claimants' position is that the processing delay of the HSBC and Hana applications was for a "wrongful purpose," namely to appease public opposition to the sale expressed in the National Assembly, by the unions, by the BAI and by a significant element of public opinion. Even the Respondent's expert did not support delay following from the abuse of authority for wrongful purposes.⁷⁰⁴
527. The Claimants complain and the Respondent denies that the FSC paused the Hana approval to satisfy its own institutional and political interest unrelated to any statutory mandate. The alleged conflict of interest is the nub of the complaints against the FSC.

⁷⁰² [REDACTED] First Expert Report, para. 34, referring to Exhibit RA-142, Supreme Court of Korea, Case No. 95Nu10877, Judgment, 20 August 1996.

⁷⁰³ Exhibit CA-250, Republic of Korea, *Administrative Procedures Act* (Law No. 8,852, partially amended 29 February 2008) ("*Administrative Procedures Act*"), Art. 4(2); Exhibit CA-574, Republic of Korea, *Administrative Litigation Act* (Law No. 6,627, 26 January 2002) ("*Administrative Litigation Act*"), Arts. 2(2), 4(3), 36; TD23, 454:2-457:7.

⁷⁰⁴ [REDACTED] First Expert Report, para. 35.

(4) The Criminal Charges Against Lone Star

528. The Respondent contends that the FSC was responsible for the integrity of financial markets in Korea and could not responsibly ignore accusations of serious criminal conduct against Lone Star. The Claimants say that the approval process involved only Hana. Complaints against Lone Star were irrelevant to that approval. Counsel expressed the Respondent's position at the 14 October 2020 Hearing as follows:

Governments tend not to allow suspected bad actors to decide their own fates by skipping town; that's why mechanisms like house arrest and extradition exist. Again, the FSC was not a criminal court, but it was still a part of the Government, and it simply can't be right that it was somehow required to enable Lone Star to leave. Remember, the regulators serve as the guardians of a system that operates around public trust, and Lone Star and its principles had been indicted for a serious financial crime that consisted precisely of manipulating public trust.⁷⁰⁵

So, just like lifeguards alert to a potential incoming storm at the beach, the regulators decided to wait, to watch, and to be ready.⁷⁰⁶

529. At this juncture, it is appropriate to examine the Respondent's position in greater detail.

a. The Inquiry Into Lone Star's 2003 Acquisition of a Controlling Interest in KEB

530. The FSC said it was required by law to investigate the 2003 exemption in response to the direction of the Korean Board of Audit and Inspection whose report of 12 March 2007 concluded that "[t]he Approval [that had been granted to Lone Star] was attained illegally, as well as unjustly, based on, among others, a distorted forecast BIS ratio as of the end of 2003."⁷⁰⁷

531. The BAI alleged that the distorted BIS ratio (on which the exemption was based) "was derived from the overstated weakness of Korea Exchange Bank according to Lone Star's

⁷⁰⁵ TD22, 216:5-16.

⁷⁰⁶ TD22, 211:12-14.

⁷⁰⁷ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

lobbying and improper requests for such overstatement.”⁷⁰⁸ As a result of this finding, the BAI issued several instructions:

- (a) the BAI instructed the Chairman of the FSC to “take an appropriate action against the flawed approval dated September 26, 2003, which authorized Lone Star’s acquisition of the KEB shares in excess of the prescribed limit;”⁷⁰⁹
- (b) the BAI itself instructed that in “decid[ing] the method and substance of resolving the flaw in the Approval granted to Lone Star ... the Financial Supervisory Commission **should comprehensively consider the progress of the [criminal proceedings against ██████████ Yang-Ho Byeon and others]**, the cost and benefit of canceling the Approval, the ramification of such cancellation, and the availability of other alternatives that can cure the flaw without the cancellation”⁷¹⁰ [emphasis added]; and
- (c) the FSC was required by law to comply with this instruction⁷¹¹ but ultimately provided the BAI with a one-page answer declaring that the FSC had “no objective fact findings” that the 2003 approval was defective and that it would await the court decision in the KEB Card Sale Case before taking any further action on whether or not to revoke the 2003 approval.⁷¹²

532. The Claimants argue that the BAI Report in respect of the 2003 KEB Share Acquisition Case did not warrant “Wait and See” because:

- (a) no Lone Star “employee,” “official” or “executive” was charged in the 2003 KEB Share Acquisition Case;⁷¹³ and

⁷⁰⁸ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29

⁷⁰⁹ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

⁷¹⁰ Exhibit C-152 / R-146, BAI Report on Sale of KEB, p. 29.

⁷¹¹ See Exhibit C-330, *BAI Act*, Art. 34-2; see also H.S. Lee First Witness Statement, para. 8; H.S. Lee Second Witness Statement, para. 9.

⁷¹² Exhibit R-021, Letter from Financial Services Commission to Board of Audit and Inspection, 8 May 2007, para. 3.

⁷¹³ Reply, paras. 14, 100, 105, 384. The Claimants admit that “Lone Star hired Mr. ██████████ as an attorney and consultant to assist in Lone Star’s acquisition of KEB” (Reply, para. 411), and that “Mr. ██████████ ... is ... mentioned in the

- (b) even if the acquisition was found to be wrongful, the FSC had no authority to unwind Lone Star's investment in KEB. LSF-KEB would still be owner of the shares until ordered to divest, which is exactly what it wanted to do.

533. However, the Respondent points out that:

- (a) Messrs. [REDACTED] [REDACTED] and [REDACTED] were not in (or had fled) the country. Investigators therefore ordered a "stay of indictment" and placed them on a "wanted" list, so that the investigation could resume if they re-entered the country;
- (b) the Respondent's expert, Professor [REDACTED] concludes that "simply because Lone Star personnel were excluded from indictment, it cannot be said that serious and credible evidence against Lone Star did not exist"⁷¹⁴ in respect of the 2003 KEB Share Acquisition Case; and
- (c) KEXIM might have sought to cancel or nullify the 2003 share purchase agreement by which Lone Star acquired 80 million KEB shares.⁷¹⁵

534. The Respondent acknowledges that the FSC decided *against* directing the method by which Lone Star would be required to dispose of its excess shareholding, and ultimately declined to order that the excess shares be sold on the stock market.⁷¹⁶ However, the Respondent says, "this fact alone cannot make it inherently unreasonable for the FSC ever to have considered the possibility, as Claimants suggest."⁷¹⁷

The Tribunal's Ruling in Respect of the FSC's Concern About the 2003 Acquisition Controversy

535. The Tribunal recognises that evidence insufficient to secure a conviction in a criminal court may nevertheless be sufficient to warrant a regulatory response. However, there is no

Supreme Prosecutor Office's report, which alleged that he was involved in 'lobbying activities regarding acquisition of KEB,' bribery of Korean officials, and a tax offense," but as stated, Mr. [REDACTED] was acquitted (Reply, para. 412).

⁷¹⁴ Expert Report of [REDACTED] 16 January 2015 ("[REDACTED] Expert Report"), para. 60.

⁷¹⁵ H.S. Lee First Witness Statement, paras. 15-16; Rejoinder, para. 576.

⁷¹⁶ Rejoinder, para. 589, referring to Exhibit C-276, Disposition Order.

⁷¹⁷ Rejoinder, para. 589, referring to Reply, Sec. III.B.2 (citing a series of documents that post-date the FSC's 18 November 2011 Disposition Order as purported evidence that "[t]he FSC has admitted that Respondent's 'punitive sale order' theory of legal uncertainty is baseless").

evidence that any administrative response was in fact undertaken following the BAI and FSC investigations into the 2003 acquisition. The professed concern for KEXIM's set-aside rights was hollow in light of KEXIM's lack of interest in pursuing any action. As early as 2008, the FSC acknowledged that KEXIM "has expressed its disapproval of the plan to take measures for the preservation of right against Lone Star because the likelihood of winning the case is low under the current circumstances and also because of the litigation costs."⁷¹⁸ In the view of the Tribunal majority, the obvious remedy was to allow the sale to proceed while reserving in escrow sufficient funds to satisfy any potential KEXIM claim.

b. Legal Uncertainty Arising From the Stock Price Manipulation Case

536. The Respondent argues that Lone Star's misconduct relating to the KEB Credit Card affiliate included (a) the concealment of material facts from the regulators;⁷¹⁹ followed by (b) the "tortious mistreatment of Olympus Capital;"⁷²⁰ and, finally, (c) the "criminal

⁷¹⁸ Reply, para. 346, quoting Exhibit C-767, Financial Services Commission, Status Report on Sale of Korea Exchange Bank, 2008, p. 6; see also Rejoinder, para. 584.

⁷¹⁹ Rejoinder, para. 521, referring to Reply, para. 446 ("According to the Claimants, 'It was only ... in the fall of 2003, after Lone Star had made its investment in KEB [i.e., after 31 October 2003], that Lone Star decided it was in the best interests of KEB to let KEB Card fail.'").

However, according to the Respondent, the evidence of Lone Star's Chairman, ██████████ in the *Olympus Capital Arbitration* was:

If [KEB Card] defaulted on its obligations, it was our plan that KEB, once under Lone Star's control, would not risk further capital to rescue [KEB Card] from default. I had no doubt that KEB could continue to succeed without a credit card subsidiary over the coming years. This was the decision on [KEB Card] that I made during the June 2003 meetings in Seoul [...] if necessary, [KEB Card] would be permitted to fail.

Rejoinder, para. 522, referring to Exhibit R-293, *Olympus Capital and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Witness Statement of ██████████ 12 January 2010 ("*Olympus Capital ICC Arbitration, ██████████ First Witness Statement*"), paras. 14, 16 [emphasis added by this Tribunal].

Eventually Lone Star recognized that merging KEB Card would be beneficial to KEB. As stated by Mr. ██████████ in an internal email he sent to Lone Star's ██████████ and ██████████ on 8 November 2003 following a phone conference with Lone Star Chairman ██████████ "[We] will realize just how much value (maybe a net increase of \$1 billion upon exit) we have added to the bank through bringing the card company in" (Exhibit R-322, Emails Between ██████████ and ██████████ November 2003).

In the *Olympus Capital ICC Arbitration*, Mr. ██████████ testified that he was initially angry at the change of plans because "[t]he proposal that we merge [KEB Card] into KEB marked a radical, risky and wholly undesired departure from the strategy that had been agreed upon prior to closing" (Exhibit R-293, *Olympus Capital ICC Arbitration, ██████████ First Witness Statement*, para. 20).

⁷²⁰ Counter-Memorial, Sec. III.D.2; Rejoinder para. 519. As discussed, Lone Star caused KEB to announce a potential capital restructuring of KEB Card, which caused KEB Card stock price to plunge, thereby creating an attractive buying

manipulation of KEB Card's stock price," all of which was relevant and material to the FSC's oversight duties.⁷²¹

537. At the material time, Lone Star nominees controlled the KEB Board of Directors.⁷²²
538. The Claimants argue that their concern about the financial state of the KEB Card was entirely justified. The affiliate had incurred large losses as reflected in KEB's year-end financial statements for 2003 and 2004.⁷²³ However, the Respondent says, the account reflected nothing more than KEB's decision (under Lone Star's management) to increase KEB Card's provisioning for bad debts to inordinately high levels.⁷²⁴ KEB obtained a significant tax benefit as a result of this accounting decision.⁷²⁵ After the crisis subsided, KEB Card was able to collect a significant portion of the debts it had written off as "bad" in 2003 and 2004, consistent with the regulators' and other industry participants' expectations.⁷²⁶ KEBCS had created a false crisis.

opportunity for Lone Star but ultimately led to its conviction for stock market manipulation. There was evidence in the *Olympus Capital* ICC Arbitration that Lone Star developed and implemented a plan to "choke" and "squeeze" Olympus Capital in a manner determined by the ICC tribunal "to have been wrongful and in breach of Korean law" (Rejoinder, para. 537, referring to, *inter alia*, **Exhibit R-324**, Email from [REDACTED] to [REDACTED] 9 November 2003).

⁷²¹ See Counter-Memorial, Secs. VII.C.1, VII.C.5; Rejoinder para. 519.

⁷²² **Exhibit C-256 / R-150**, Second High Court Judgment, Stock Price Manipulation, p. 13:

On or around October 31, 2003, Lone Star Fund held 51% of the total number of shares in KEB as result of performance of the share sale and purchase agreement dated August 27, 2003. The board of directors of KEB consisted of the total of ten (10) directors, i.e., three (3) directors respectively nominated by Commertz Bank, KEXIM and BOK, the President, the Vice President and five (5) directors nominated by Lone Star. [REDACTED] as Chairman, [REDACTED] as Vice Chairman, [REDACTED] as General Counsel, [REDACTED] and [REDACTED] [REDACTED] became outside directors of KEB, based on the recommendation of Lone Star Fund.

⁷²³ Reply, para. 453.

⁷²⁴ Rejoinder, para. 563, referring to, *inter alia*, **Exhibit R-320**, *Olympus Capital and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Expert Report of [REDACTED] 18 August 2010 ("*Olympus Capital* ICC Arbitration, [REDACTED] Expert Report"), paras. 32-33, 44-47, 86 (opining that "[t]he high levels of provisioning taken by [KEB Card] in the fourth quarter of 2003 were well beyond industry norms, regulatory requirements, and [KEB Card's] own prior methodologies").

⁷²⁵ Rejoinder, para. 563, referring to, *inter alia*, **Exhibit R-363**, *Olympus Capital and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Hearing Testimony of [REDACTED] 11 November 2010, TD2, 70:17-21.

⁷²⁶ Rejoinder, para. 563 and n. 1132, referring to J.H. Kim Second Witness Statement, para. 18; **Exhibit R-320**, *Olympus Capital* ICC Arbitration, [REDACTED] Expert Report, paras. 63-64 (estimating that "KEB Card ultimately recovered at least 40% of its re-written receivables, a far higher percentage than that implied by the company's abnormally high provisioning in 2003 for losses on the re-written portfolio").

539. Citigroup had projected, in October–November 2003, that ultimately KEB Card would contribute significant value to Lone Star’s KEB investment. The Respondent’s expert, Mr. [REDACTED] estimated that 20% of the HSBC SPA price, or USD 1.2 billion, was attributable to KEB Card.⁷²⁷
540. On 6 October 2011, the Seoul High Court found that Lone Star’s appointees to the KEB Board of Directors, Messrs. [REDACTED] [REDACTED] [REDACTED] and [REDACTED] had engaged in a criminal conspiracy to gain unjust profits for the benefit of LSF-KEB Holdings SCA in violation of Korea’s *Securities and Exchange Act*.⁷²⁸
541. That conviction was predicated on the involvement of LSF-KEB’s director and legal advisor, Mr. [REDACTED]⁷²⁹ in the illegal stock price manipulation.⁷³⁰ As described by the Seoul High Court:

[REDACTED] *Representative Director of Defendant LSF-KEB, in collusion with Defendant [REDACTED] [REDACTED] and [REDACTED] caused the stock price of KEBCS to fall and benefited KEB and LSFKEB by the amount of gain of approximately KRW 22.6 and approximately KRW 17.7 billion, respectively by way of spreading the false rumor of a capital reduction with respect to the KEBCS. In order to obtain improper gains with respect to the sale and other transactions involving securities, Defendant [REDACTED] [REDACTED] [REDACTED] and [REDACTED] intentionally disseminated untrue facts or other rumors,*

⁷²⁷ [REDACTED] Second Expert Report, para. 105 and Table 11.

⁷²⁸ Exhibit C-256 / R-150, Second High Court Judgement, Stock Price Manipulation, pp. 34-35:

In the course of promotion of Lone Star Fund’s policy to merge KEBCS, subsidiary of Defendant KEB which had suffered liquidity crisis due to rapid increase of default rate of credit card users, into Defendant KEB, Defendant [REDACTED] in conspiracy with [REDACTED] [REDACTED] and [REDACTED] appointed as directors of Defendant KEB by Lone Star Fund, made up his mind to artificially decrease the stock price of KEBCS for the purpose of solving the increase of merger cost by high price of appraisal right of minority shareholders of KEBCS dissenting such merger when the stock price of KEBCS remained high and the excessive decrease of Defendant LSF-KEB’s ownership interest in Defendant KEB, the surviving company of merger.

[...]

As such, Defendant [REDACTED] in conspiracy with [REDACTED] [REDACTED] and [REDACTED] intentionally used deception for the purpose of gaining unjust profit in relation to the trade of securities and other transaction[s] which resulted in Defendants KEB and LSF-KEB’s profit of 5 billion won.

⁷²⁹ Exhibit R-150, Seoul High Court, 10th Criminal Department, Judgment Case No. 2011No806, 6 October 2011 (“High Court Judgment on Remand, Stock Price Manipulation”), pp. 3, 6.

⁷³⁰ Exhibit R-150, High Court Judgment on Remand, Stock Price Manipulation, pp. 14-15.

*thereby benefitting LSF-KEB by more than KRW 5 billion. After all, Representative Director of Defendant LSF-KEB, [REDACTED] and [sic] et al. acted in violation of the SEA [Securities and Exchange Act] with respect to the ordinary businesses of LSF-KEB.*⁷³¹ [emphasis added]

542. The Claimants take the position that the Stock Price Manipulation Case ought not to have occasioned delay because there were “only two possible remedies” in the event LSF-KEB was convicted: (1) Lone Star would be prevented from exercising the voting rights associated with the excess shares, and (2) its shares would be ordered to be sold “without any conditions.”⁷³² It is true that the FSC considered ordering Lone Star to dispose of its excess shareholding on the stock market, but the Claimants say such an order would have been illegal,⁷³³ and that the FSC had acknowledged as much in 2008,⁷³⁴ and therefore ruled out the possibility of pursuing any such remedy.⁷³⁵ In the 18 November 2011 Disposition Order, the FSC actually *did* reject the possibility of an open stock market sale order.⁷³⁶
543. The Respondent contends that in the *Olympus Capital* ICC arbitration, the Claimants repeatedly acknowledged that the regulator’s concerns about systemic risk in the credit card business were valid. For example, Lone Star’s chief executive, Mr. [REDACTED] testified that “[t]here was a systemic risk that was building in the system, there was the biggest credit card company of all [LG Card] that was also on the verge [of default], and the regulators were very, very concerned about this, with good reason.” Lone Star’s second-in-command, Mr. [REDACTED] similarly testified that Lone Star “understood the fears that the

⁷³¹ Exhibit R-150, High Court Judgment on Remand, Stock Price Manipulation, pp. 14-15 [Respondent’s translation].

⁷³² Reply, para. 351.

⁷³³ Reply, paras. 349-361.

⁷³⁴ Reply, paras. 352-356.

⁷³⁵ Reply, paras. 136-140. See also Reply, para. 16 (“The FSC also determined very early on in its consideration of HSBC’s application that it could not order Lone Star to sell its shares on the open market, yet it kept that issue alive for years as a talking point for asserting that there was ‘legal uncertainty’ surrounding Lone Star’s ability to sell its shares.”).

⁷³⁶ Reply, paras. 352-357, citing, *inter alia*, Exhibit C-274, Financial Services Commission Press Release, “Financial Services Commission Orders Lone Star Share Disposal Within 6 Months,” FSC Press Release, 18 November 2011; Exhibit C-513, Financial Services Commission and Financial Supervisory Service, Report on Pending Issues to the National Policy Committee, December 2011; Exhibit C-836, Minutes of the National Assembly Hearing of the National Policy Committee, 26 December 2011, p. 14; Exhibit C-515, Financial Services Commission, Questions and Answers Relating to Disposal Order (undated but discussing the 18 November 2011 Disposition Order as if it already had been issued); Exhibit C-771, FSC, Regarding the Parliamentary Investigation of Lone Star, p. 10 (undated but discussing the 18 November 2011 Disposition Order as if it already had been issued); Exhibit C-769, Financial Services Commission, Q&A in Regard to Lone Star, p. 10 (undated but discussing the 18 November 2011 Disposition Order as if it already had been issued). See also Rejoinder, para. 586.

failure of [KEB Card] could lead to a systemic collapse,” and “wanted to avoid being responsible for exposing the market to that risk if possible.”⁷³⁷

544. While in the present proceeding, the Claimants accuse the Respondent of having “dramatically” overstated the risks that a failure of KEB Card could have posed to the financial system,⁷³⁸ Senior Deputy Governor J.H. Kim testified that this position “ignores that KEB Card and LG Card were facing crises at *precisely the same time*,” and that a KEB Card default would have triggered “an *uncontrollable* default of LG Card, and the default of two major credit card companies at the same time likely would have caused the credit markets to seize up, triggering a wave of defaults at other financial institutions and eventually a full-blown systemic crisis.”⁷³⁹

The Tribunal’s Ruling on the FSC’s Resort to the Stock Manipulation Controversy

545. The Tribunal does not agree with the Claimants’ attempt to minimise the significance of the Stock Price Manipulation Case and to deny the legitimacy of the FSC’s regulatory interest in it.
546. In the Tribunal’s view, the FSC was entitled to take the view that LSF-KEB was not discharged from regulatory consequences by the payment of a criminal court fine.
547. The evidence in the *Olympus Capital* ICC arbitration was that Lone Star developed and implemented a plan to “choke” and “squeeze” Olympus Capital in a manner determined by the ICC tribunal to have been wrongful and in breach of Korean law.
548. As to the KRW 25 billion fine imposed against LSF-KEB, the Seoul High Court found that soon after the transaction KEB had realised KRW 12,375,770,000 in profit, while LSF-KEB had similarly realised a profit of KRW 10,002,500,000 by that time.⁷⁴⁰ The expert evidence of Mr. [REDACTED] is that the stock manipulation yielded Lone Star a profit

⁷³⁷ Rejoinder, paras. 559-560, citing **Exhibit R-312**, *Olympus Capital and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Hearing Testimony of [REDACTED] 17 November 2010, TD8, 111:25-112:4; **Exhibit R-295**, *Olympus Capital and others v. Korea Exchange Bank and others*, ICC Case No. 15776/JEM/CYK, Witness Statement of [REDACTED] First Witness Statement, 12 January 2010, para. 26.

⁷³⁸ Reply, para. 456.

⁷³⁹ J.H. Kim Second Witness Statement, para. 13 [emphasis original].

⁷⁴⁰ **Exhibit C-256**, High Court Judgment, October 2011, pp. 27-28.

on the order of USD 806 million (from which would be subtracted the USD 64 million ordered by the ICC to be paid to Olympus Capital).⁷⁴¹ The Claimants' expert, Professor [REDACTED] does not set out a competing estimate. The Tribunal accepts the reluctance of the FSC to see the fine imposed by the criminal court as simply a regular cost of Lone Star doing business without regulatory denunciation. Otherwise, the departure of the foreign investor would simply emphasise the success the foreign investor had in working the financial system to its benefit.

549. However, according to the majority of the Tribunal, the FSC strategy, on a balance of probabilities, was motivated not by legitimate "prudential" concerns, but by the FSC's own view of its institutional self-interest. It did not wish to risk the wrath of public and political opinion by giving approval to the Hana transaction at an "excessive" share price that would be criticised by politicians, unions, the BAI and the media.

550. Of course, Lone Star was still the legal owner of the control block of shares, but Lone Star could not sell the entire block as a control block without FSC approval of an "eligible" purchaser. Lone Star's misconduct had put its KEB investment in harm's way and the FSC

⁷⁴¹ [REDACTED] Second Expert Report, paras. 107-108 and Tables 12-13:

Table 12 – Potential Set Offs Related to KEBCS under Each of Dr. [REDACTED] Damages Scenarios⁷⁴

(All Amounts in US\$ Millions, Interest to 30 September 2013)

| Calculation | Component | HSBC Offer Case | Hana Offer Case | Hana Offer Case Plus 25% Premium |
|-----------------|---------------------------------------|-----------------|-----------------|----------------------------------|
| [A] | SPA Price for KEB Group | 6,013 | 4,342 | 4,613 |
| [B] | Interest | 61.9 | 4.8 | 5.1 |
| [C] = A + B | SPA Price for KEB Group with Interest | 6,075 | 4,346 | 4,618 |
| [D] = C x 20% | Portion Related to KEBCS | 1,215 | 869 | 924 |
| [E] | Claimants' Investment in KEBCS | 55 | 55 | 55 |
| [F] | Interest on KEBCS Investment | 9 | 9 | 9 |
| [G] = D - E - F | Profit on KEBCS | 1,151 | 806 | 860 |

Table 13 – Dr. [REDACTED] Damages Calculations Excluding Profits from KEBCS⁷⁵

(All Amounts in US\$ Millions)

| Component | HSBC Offer Case | Hana Offer Case | Hana Offer Case Plus 25% Premium |
|--|-----------------|-----------------|----------------------------------|
| Dr. [REDACTED] Calculation of Total Loss | 1,731 | 433 | 704 |
| KEBCS Set Off | 1,151 | 806 | 860 |
| Revised Total Loss | 580 | -373 | -156 |

See also Respondent's Closing Statement, 2 June 2016, slide 433.

conditioned its approval on a reduced price which, according to the majority of the Tribunal, had nothing to do with Hana's financial credentials or the FSC's "prudential" role.

(5) The Claimants Allege that the FSC was Always in a Conflict of Interest Between the Discharge of its Mandate Under the *Banking Act* and the *Financial Holding Companies Act* and its Own Institutional Wish to Appease Popular and Political Opposition to "Eat and Run" Foreign Investors

551. The Claimants place a major emphasis on what they consider to be treaty violations in relation to HSBC. While the Tribunal has determined that the circumstances of the HSBC transactions fall outside of the 2011 BIT, the Claimants nevertheless argue that the HSBC facts should be seen as relevant "similar fact" evidence to explain what the Claimants argue is a similar pattern of misconduct in relation to the Hana transaction in 2011–2012.

552. The Claimants say that the FSC's failure to approve the HSBC sale was motivated by its attempts to accommodate "a zealously anti-Lone Star political environment and advantaging the domestic Korean banking industry, while preventing the 'outflow of national wealth' to the greatest extent possible."⁷⁴²

553. The Claimants contend that the FSC was never seriously motivated by a concern about the outcome of criminal proceedings, as is shown in a series of internal FSC documents in the record.⁷⁴³

⁷⁴² Reply, para. 1241, citing **Exhibit C-761**, FSC, Review on the Supervisory Authorities' Direction of Reaction on the Sale of KEB Shares, 21 August 2007, pp. 4-5.

⁷⁴³ Among other documents, the Claimants rely on the following:

Exhibit C-426, Cable from U.S. Embassy in Seoul, 25 July 2008, pp. 4-5: "[FSC Chairman] Jun did not mention waiting for any appeals to that case [the KEB Sale Case] to play out, nor did he reference the separate court case on KEB's late 2003 purchase of outstanding shares in its credit card subsidiary. Asked what might happen to the KEB sale (and public sentiment) in the defendants in the BIS-ratio case [otherwise referred to as the KEB Sales Case] ..., [FSC Chairman] Jun smiled and said, 'Well, it seems like the worst we could do is just what they want us to do' (i.e., order Lone Star to sell its KEB shares)."

Exhibit C-510, FSC, Draft Approval of HSBC's Shareholding on KEB Shares (Summary), p. 2: The FSC was prepared to approve the HSBC's excess shareholding of KEB shares, including a draft approval "[a]s a result of the examination, it is determined that HSBC, etc. satisfies the approval requirement as it is a financial company and holding company of a financial company pursuant to the laws of the relevant jurisdiction, operating banking business across the world by building business network over 26 countries, and has international credibility, etc."

554. The result of the FSC political paralysis and reliance on multiple pretexts for delay was that Lone Star was stuck in Korea for many years, as the value of its investment in KEB declined.⁷⁴⁴
555. HSBC withdrew its application shortly after its SPA with Lone Star expired according to its terms (on the day, as noted previously, when the Lehman Brothers Bank failed).⁷⁴⁵ Accordingly, the Respondent says, the cause of any loss by Lone Star on the HSBC transaction was Lone Star's failure to protect itself against HSBC's contractual right to

Exhibit C-755, Email from ████████ to ████████ 20 September 2008: "With regards [*sic*] to HSBC's termination, [Chairman Jun] said that, although it might have a low probability of success, if HSBC and Lonestar for some reason decided to renegotiate a deal that was mutually acceptable then the FSC will give approval this month (September). This has been agreed with the Blue House and key ministries."

Exhibit C-576, FSC, Regarding Lone Star's Sale of KEB, 24 June 2008: A "disadvantage" of approving HSBC's application was that "there is a possibility that it may lead to the negative public opinion that the **government aided and abetted Lone Star's 'eat and run.'**" An "[a]dvantage[]" to "[a]ttach [c]onditions for [s]ale" is "[i]t may somewhat mitigate the controversy over Lone Star's 'eat and run'" [emphasis original]. Delaying HSBC's application is also described as an "[a]dvantage[]" because, "[i]f the agreement with HSBC is terminated, it is possible for domestic banks to participate in the acquisition." The report includes a table showing Lone Star's investment return and capital gain if the FSC approved the sale to HSBC.

Exhibit C-766, FSC, Review on Supervisory Authorities' Direction of Reaction regarding Negotiation on the Sale of Korea Exchange Bank Shares between Lone Star and HSBC Asia Pacific Holdings (UK) Ltd, 25 August 2007, p. 4: "Korean banks' participation in the acquisition competition [for Lone Star's KEB shares] may **raise the sale price**, resulting in the 'eat and run' controversy" [emphasis original].

Exhibit C-573, FSC, In Relation to the Negotiation on the Sale of KEB Shares Between Lone Star and HSBC, pp. 3-5: The postponement of HSBC approval described as advantageous as the sale of KEB to HSBC would "**forestall[] an opportunity to introduce mega bank** through a merger between domestic banks," and the FSC should therefore "**delay the approval review [of HSBC's application] by returning or withholding the application form**" and "**[c]onsider the way to have domestic banks to participate in acquiring KEB**" [emphasis original].

Exhibit C-763 Revised, FSC, Report on the Progress of KEB Sale and Direction of Handling, September 2008, [under "Option 3"]: If the FSC "grants HSBC an early approval for the acquisition," one "[e]xpected side effect" would be that "[d]omestically, controversy over Lone Star's eat and run could intensify."

Exhibit C-845, FSC, Report on the Progress of the Sale of Korea Exchange Bank (Lone Star – HSBC), p. 1: If HSBC terminates the contract with Lone Star, "[t]here is a possibility that in the global market, the termination of the agreement will be attributed to '**the Koreans' sentiment against foreign capital and the government's withholding of approval under the pretext of such antipathy**'" [emphasis original].

Exhibit C-737 Revised, Main Issues Regarding the Sale of Korea Exchange Bank (partially unredacted per Special Referec), August 2008, p. 12: "If HSBC, a foreign bank, acquires the stake currently held by Lone Star, it can **prevent additional outflow of national wealth**" [emphasis original].

Exhibit C-767 Revised, FSC, Status Report on Sale of Korea Exchange Bank, 2008, p. 10 (includes table showing Lone Star's investment return and capital gain if the FSC approved the sale to HSBC).

Exhibit C-761, Review of the Direction of the Supervisory Authorities' Response with Regard to the Sale of Korea Exchange Bank Shares, 21 August 2007, pp. 4-5.

⁷⁴⁴ Reply, para. 1257.

⁷⁴⁵ Rejoinder, para. 653; **Exhibit R-044**, "Agreement for proposed acquisition of a 51% shareholding in Korea Exchange Bank terminated," *HSBC Press Release*, 18 September 2008.

walk away from the transaction when HSBC decided the acquisition was no longer in its commercial interests.

The Tribunal's Ruling on the Relevance of the HSBC Dispute to the Present Case

556. The 2008 HSBC dispute is not actionable under the 2011 BIT. It is therefore unnecessary to address the Parties' detailed submissions in that respect. However, in light of the Respondent's reliance on its "Wait and See" policy in relation to the Hana approval, it is a relevant background that between September 2008 and October 2010, when the global financial crisis hit and the HSBC application was pending, it appears from the FSC's internal documents that the predominant concern was the "Eat and Run" syndrome, even though both the 2003 KEB Share Acquisition Case and KEB Stock Price Manipulation Case were pending.⁷⁴⁶
557. The Respondent claims (and the Claimants dispute) that the FSC followed its "Wait and See" policy consistently, but the question is whether the policy was used by the FSC to serve an illegitimate purpose.⁷⁴⁷ For the majority of the Tribunal, appeasement of the politicians and other critics was not a legitimate factor in the Hana approval.
558. According to a majority of the Tribunal, the facts of the 2008 HSBC approval process demonstrate the willingness at that time of the FSC to let political concerns operate to stall the approval of a highly qualified purchaser.
559. In the majority view, this is relevant background when it comes to the analysis of the events of 2011 and 2012 involving Hana Bank.

(6) Lone Star Alleges Misconduct in Relation to Hana Bank

560. On 27 January 2010, LSF-KEB Holdings SCA executed an engagement letter with Credit Suisse (Hong Kong) to act as lead financial advisor in selling its 51% stake in KEB.⁷⁴⁸ The sale was named Project Orion. In April 2010, Credit Suisse produced an Information

⁷⁴⁶ See, e.g., Claimants' Closing Statement, 15 October 2020, slide 7.

⁷⁴⁷ See **Exhibit CA-062**, C. Schreuer, "Chapter 10: Protection against Arbitrary or Discriminatory Measures," in C. Rogers and R. Alford, *The Future of Investment Arbitration* (Oxford University Press: 2009), p. 188.

⁷⁴⁸ **Exhibit C-584**, Engagement Letter Between Credit Suisse (Hong Kong) Limited and LSF-KEB Holdings SCA, 27 January 2010.

Memorandum.⁷⁴⁹ By 21 April 2010, there was a flurry of media reports. *Yonhap Infomax* reported that “[a]t the end of last month [March 2010], Lone Star sent out teaser letters to some 50 domestic and foreign potential investors, resuming the sale process in earnest.”⁷⁵⁰

561. By November 2010, Hana had become aware that Lone Star’s negotiations with the one interested buyer, the Australian bank ANZ, had reached a gridlock.⁷⁵¹ At that point, ██████████ testified, LSF-KEB was “eager to sell ... even if we had to do so at what we believed was less than a fair price.”⁷⁵²
562. Hana’s Chairman, Mr. ██████████ met with Mr. ██████████ in London, England on Saturday, 13 November 2010 to sign a Memorandum of Understanding.⁷⁵³

⁷⁴⁹ Exhibit C-221, Project Orion: Information Memorandum, April 2010.

⁷⁵⁰ Exhibit R-539, Email from ██████████ to ██████████ 21 April 2010. It is unclear whether these letters were sent in March or early April, since on 25 November 2010, *Yonhap* reported that Lone Star had started its process to sell KEB on 5 April 2010 (Exhibit C-458, “Key developments leading to Sale of KEB to Hana Financial,” *Yonhap English News*, 25 November 2010).

⁷⁵¹ ██████████ First Witness Statement, para. 5:

In the fall of 2010, Lone Star was in close negotiations with the Australia and New Zealand Banking Group (“ANZ”) as the potential buyer of KEB. However, Hana obtained information that the negotiations between Lone Star and ANZ had reached a gridlock, and approached Lone Star at an appropriate point in time to start negotiations. On November 13, 2010, Lone Star’s Chairman, Mr. ██████████ and I met in London and signed a Memorandum of Understanding.

⁷⁵² Exhibit CWE-007, ██████████ First Witness Statement, para. 56:

Thus, while Lone Star received expressions of interest from [ANZ] and from MBK Partners, a Korean private equity fund that had partnered with Nomura Holdings, neither of them seemed prepared to move forward with a deal. ANZ, in particular, spent months doing due diligence and seemingly maneuvering to make a low-ball offer for LSF-KEB’s stake. Without competition from the global or even other regional financial institutions who had been scared off by HSBC’s experience, ANZ apparently felt it had the leverage to make a low offer (although one would never come), since Lone Star seemed to have no real alternatives. This was very frustrating to us, given that KEB had survived the global financial crisis better than the majority of banks in Korea and its shares continued to trade above book value. But ANZ’s insights were fundamentally accurate: at this point, Lone Star was eager to sell its KEB shares to any interested buyer - even if we had to do so at what we believed was less than a fair price. [emphasis added]

⁷⁵³ ██████████ First Witness Statement, para. 5; the Memorandum of Understanding of 13 November 2010 was not produced in this reference.

563. The media reported this development on Monday, 15 November 2010. Estimates of the value of Lone Star's stake in KEB on that day ranged from USD 3.8 billion⁷⁵⁴ to USD 4.1 billion.⁷⁵⁵ It was also reported that Hana would likely pay a 10% control premium.⁷⁵⁶
564. It will be recalled that on 15 November 2010, Lone Star's stake in KEB was still unprotected by any BIT.
565. Almost immediately, Hana's announcement met with "staunch opposition" from KEB's labour union.⁷⁵⁷ On 23 November 2010, 300 KEB union members rallied outside of the FSC building in Seoul to demand that the FSC supervise the soundness of Hana's capital. They termed the acquisition a "Big Bang" for Korea's financial industry.⁷⁵⁸ (The union had been more supportive of ANZ's potential acquisition.)⁷⁵⁹
566. During a phone interview on 23 November 2010, Hana's President, [REDACTED] told the press that Hana will "negotiate until the last minute for the price" and the media anticipated that Hana would offer \$4.1 billion for KEB.⁷⁶⁰ The next day, 24 November

⁷⁵⁴ Exhibit C-438, "WSJ: Lone Star Funds Agrees to Sell KEB to Hana Bank – Source," *Dow Jones News Service*, 15 November 2010 ("Lone Star's stake is worth about \$3.8 billion based on KEB's latest share price.").

⁷⁵⁵ Exhibit C-440, "UPDATE 4 – Hana in talks to buy Korea Exchange Bank for \$4.1 bln; ANZ sidelined," *Reuters News*, 15 November 2010 ("Hana Financial Group is in talks with private equity firm Lone Star to buy a \$4.1 billion stake in Korea Exchange Bank, elbowing aside rival suitor [ANZ].").

⁷⁵⁶ Exhibit C-437, "S. Korean bank may cut out ANZ in bid for Korea Exchange Bank: reports," *Agence France Presse*, 15 November 2010 ("While full terms of the deal were not yet known, Hana would likely pay a premium of 10 percent or more to the current market value, the Wall Street Journal quoted a person close to the transaction as saying."); Exhibit C-438, "WSJ: Lone Star Funds Agrees to Sell KEB to Hana Bank - Source," *Dow Jones News Service*, 15 November 2010 ("While the exact terms of the deal weren't yet known, Hana would likely pay a premium of 10% or more to the current market value, the person said."); Exhibit C-439, "MARKET TALK: Hana Financial +2.7% On KEB Stake Buy News," *Dow Jones International News*, 15 November 2010 ("Person familiar with situation tells WSJ though exact terms of deal not yet known, Hana would likely pay 10% premium or more to current market value.").

⁷⁵⁷ Exhibit C-446, "Korea Exchange Bank Union Protests Hana Group's takeover," *The Korea Times*, 19 November 2010.

⁷⁵⁸ Exhibit C-226, "Second Financial Big Bang from Hana – Its Suspicious KEB Acquisition," *Kyunghyang Shinmun*, 23 November 2010.

⁷⁵⁹ Exhibit C-453, "Hana to become No. 3 with acquisition of Korea Exchange Bank," *The Korea Herald*, 24 November 2010 ("The union has been supporting the merger between the Australia & New Zealand Banking Group which recently conducted due diligence on KEB.").

⁷⁶⁰ Exhibit C-449, "Hana Offers Up to \$4.1 Billion for Lone Star Stake in Korea Exchange Bank," *Bloomberg*, 23 November 2010 ("Hana Financial bid between 4.5 trillion won and 4.8 trillion won for the 51 percent stake and will 'negotiate until the last minute for the price,' President Kim Jong Yeol said in a phone interview today.").

2010, it was reported that Hana's Board of Directors had approved the acquisition.⁷⁶¹ The price was KRW 14,290 per share for a total purchase price of USD 3.1 billion.

567. After the Hana Board made its KEB announcement, speculation turned to how Hana would pay for the acquisition. Some reported that Hana would sell bonds and seek investors;⁷⁶² others suggested preferred shares.⁷⁶³ There was a report that Hana would issue KRW 1 trillion of corporate bonds.⁷⁶⁴ Analysts told *Bloomberg News* that the acquisition might be paid for through bonds or loans, or even through Hana Bank paying a dividend to Hana Financial.⁷⁶⁵ One way or another, financing involved commitments that ultimately would make it difficult for Hana to walk away from the transaction.
568. On 25 November 2010, Hana and Lone Star executed a Share Purchase Agreement⁷⁶⁶ and both companies filed Large Shareholding Reports with the FSC.⁷⁶⁷
569. The Respondent's version of events – which is not contested by the Claimants – is that the regulators made progress in the three months following Hana's December 2010 submission and were preparing to put the application on the Commission's agenda for an upcoming meeting on 16 March 2011.⁷⁶⁸ However, as stated earlier, on 10 March 2011, the Supreme Court vacated the June 2008 acquittal of LSF-KEB, KEB and Mr. [REDACTED] and remanded

⁷⁶¹ Exhibit C-452, "Board of directors of Hana Financial Group approves acquisition of 51.02% stake in Korea Exchange Bank," *MarketLine*, 24 November 2010.

⁷⁶² Exhibit C-454, "Hana, Lone Star to ink Korea Exchange Bank deal today," *The Korea Times*, 24 November 2010 ("Regarding its funding plan, [Hana Chairman S.Y.] Kim said that Hana will sell bonds and seek financial investors to raise funds needed to pay for the stake.").

⁷⁶³ Exhibit C-455, "Banking Deal Thwarts Seoul; Hana to Buy Korea Exchange Bank Stake From Lone Star, Leaving Woori Without a Top Suitor," *The Wall Street Journal Online*, 24 November 2010 ("Hana doesn't plan to make a rights issue to fund the stake purchase, the spokesman said. Instead, it may seek other financial investors or issue preferred shares or bonds.").

⁷⁶⁴ Exhibit C-456, "UPDATE: Hana To Buy 51% Korea Exchange Bank Stake For KRW4.65T-KRW4.75T," *Dow Jones International News*, 24 November 2010 ("Online news provider *Yonhap Infomax* earlier reported that Hana will issue KRW1 trillion of corporate bonds.").

⁷⁶⁵ Exhibit C-457, "Hana Financial May Sell Debt to Finance Acquisition of Korea Exchange Bank," *Bloomberg*, 25 November 2010, p. 2 ("South Korea's fourth-largest financial company may borrow 2.2 trillion won through bonds or loans to fund the acquisition, according to the average estimate of five analysts surveyed by *Bloomberg News*. Hana Financial may also raise 2.62 trillion won through a dividend from its Hana Bank unit, the survey showed.").

⁷⁶⁶ Exhibit C-227, SPA Between Lone Star and Hana.

⁷⁶⁷ Exhibit C-882, Hana Financial Group Large Shareholding Report, 25 November 2010; Exhibit C-883, Lone Star Large Shareholding Report, 25 November 2010.

⁷⁶⁸ J.H. Sohn Second Witness Statement, para. 6.

the case for further proceedings.⁷⁶⁹ A review of the reasons of the Supreme Court led the FSC to anticipate that the Seoul High Court would enter a guilty verdict against Lone Star, and impose a punishment on Lone Star for its crime.⁷⁷⁰ A conviction would lead to LSF-KEB's loss of eligibility to own more than 10% of KEB stock, loss of voting rights, and, potentially, a compulsory sale order. The FSC took the view that these events impacted the Hana approval process.

570. The Claimants, on the other hand, deny that the FSC had any good faith reason to delay approval, and point to a series of what they consider to be hostile FSC actions in respect of the Hana transaction which they consider to be violations of the 2011 BIT:

- (a) failure to observe mandatory processing deadlines;
- (b) subordinating performance of its statutory mandate to appeasement of public hostility to the "Eat and Run" investor;
- (c) frivolous revisiting of NFBO status;
- (d) pressuring Hana to abort Hana's interim KEB share purchase agreement;
- (e) pressuring Hana to oppose payment of KEB's 2011 dividend; and
- (f) using Hana as its agent to convey to Lone Star the FSC's need for Lone Star to agree to a lower sale price for the KEB shares as a condition of its approving the sale to Hana.

571. At this juncture, it is appropriate to scrutinise the FSC's treatment of the Hana approval in detail.

(7) Chronology of Disputed Events in the Hana Transaction

572. The Claimants contend that as part of the FSC strategy to placate hostile public opinion, the FSC delayed its approval of the Hana application and then made approval conditional

⁷⁶⁹ Exhibit C-233 / R-151, Supreme Court Judgment, Stock Price Manipulation; D.G. Sung First Witness Statement, para. 14 (describing the surprising nature of this decision).

⁷⁷⁰ D.G. Sung First Witness Statement, para. 14.

on Lone Star accepting a *net* USD 433 million⁷⁷¹ price reduction for its majority stake in KEB.

573. The Respondent argues that it was Hana, not the FSC, that believed a lower sale price might ease public and political resistance to the deal and says the price reduction resulted from Hana's own perception of commercial advantage presented by (i) Lone Star's conviction; (ii) the FSC's resulting sale order; and (iii) the deteriorating economy.⁷⁷² Hana acted on its own interest not as the FSC's "servant."
574. For ease of reference, the relevant chronology may provide a useful framework for the discussion that follows:
- (a) February 2008, Mr. [REDACTED] LSF-KEB, and KEB convicted at trial in the Stock Manipulation Case;
 - (b) June 2008, the Seoul High court overturns the Stock Price Manipulation convictions on appeal;
 - (c) November 2008, acquittal of Messrs. Yang-Ho Byeon and [REDACTED] in the 2003 KEB Share Acquisition Case;
 - (d) 25 November 2010, Share Purchase Agreement between Lone Star and Hana at KRW 14,290 per share;
 - (e) 9 December 2010, First Amendment to Share Purchase Agreement between Lone Star and Hana;⁷⁷³
 - (f) **13 December 2010, First Hana Application to FSC;**
 - (g) 29 December 2010, Hana consultation with FSC;

⁷⁷¹ See above paragraph 193, note 184, and Exhibit CWE-034a, Appendices to [REDACTED] Second Expert Report, Appendix B.

⁷⁷² Counter-Memorial, para. 344. See also [REDACTED] First Witness Statement, para. 13.

⁷⁷³ Exhibit C-229, First Amendment to Share Purchase Agreement Between Lone Star and Hana Financial Group, 9 December 2010.

- (h) 1 February 2011, supplementary documents requested from Hana;⁷⁷⁴
- (i) 28 February 2011, FSC lists Hana's application on the 16 March 2011 agenda for the FSC Commission;⁷⁷⁵
- (j) 10 March 2011, supplementary documents submitted;⁷⁷⁶
- (k) **10 March 2011, reversal of the acquittal of LSF-KEB, KEB and [REDACTED] for price manipulation by the Supreme Court;**
- (l) 10 March 2011, Fair Trade Commission ("FTC") approval;
- (m) 16 March 2011, date of FSC meeting originally expected to grant approval to Hana transaction;
- (n) 27 March 2011, BIT enters into force;
- (o) 29 March 2011, meeting between Hana and Lone Star in Honolulu;
- (p) 8 July 2011, Hana and Lone Star sign an amended SPA reducing share price from KRW 14,250 to KRW 13,390, having regard to mid-year dividend yielding a total purchase price of USD 4.1 billion;
- (q) **6 October 2011, conviction against LSF-KEB and [REDACTED] for stock price manipulation (KEB itself was acquitted);**
- (r) 7 October 2011, FSC Chairman receives hostile reception at the National Assembly;
- (s) 12 October 2011, Lone Star announces it will not appeal the criminal conviction;

⁷⁷⁴ Exhibit R-098, Financial Supervisory Service's Request to Hana Financial Group for Supplementary Submission to Application for Preliminary Approval of Inclusion of Korea Exchange Bank as a Subsidiary, 1 February 2011 ("FSS Request").

⁷⁷⁵ Exhibit C-232, "Financial Services Commission Takes Final Steps to Complete Korea Exchange Bank Sale," *Korea JoongAng Daily*, 3 March 2011.

⁷⁷⁶ Exhibit R-544, Letter from Hana to FSS, 10 March 2011 (submitting supplementary information) ("Cover Letter to Hana Supplementary Submission").

- (t) 17 October 2011, FSC delivers Advance Notice of Disposition;⁷⁷⁷
- (u) 25 October 2011, Compliance Order;⁷⁷⁸
- (v) 11 November 2011, meeting between Hana and Lone Star in London;⁷⁷⁹
- (w) 14 November 2011, Hana submits a report to the FSC;⁷⁸⁰
- (x) 18 November 2011, Disposition Order;⁷⁸¹
- (y) 25 November 2011, meeting between Hana and Lone Star;
- (z) 25 November 2011, telephone conversation between the Hana and FSC Chairmen;
- (aa) 26 November 2011, follow-up meeting between Hana and Lone Star;
- (bb) **3 December 2011, Third Amended Share Purchase Agreement at KRW 11,900 per share;**
- (cc) **5 December 2011, Second Hana Application;**
- (dd) 8 December 2011, supplementary documents requested;
- (ee) 29 December 2011, supplementary documents submitted;
- (ff) 11 January 2012, supplementary documents requested;
- (gg) 16 and 27 January 2012, supplementary documents submitted;
- (hh) 27 January 2012, FSC approval of KEB sale to Hana;

⁷⁷⁷ Exhibit R-102, Financial Services Commission Notification of Intended Measures, 17 October 2011.

⁷⁷⁸ Exhibit C-261, Compliance Order.

⁷⁷⁹ Exhibit C-268, Transcript of Meeting Between Lone Star and [REDACTED] 11 November 2011.

⁷⁸⁰ Exhibit C-271, Hana Financial Group, Report to Financial Services Commission on Status of Korea Exchange Bank Share Purchase Agreement, 14 November 2011.

⁷⁸¹ Exhibit C-274, "Financial Services Commission Orders Lone Star Share Disposal Within Six Months," *FSC Press Release*, 18 November 2011; Exhibit C-276, Disposition Order.

- (ii) 18 May 2012, date by which LSF-KEB was required to dispose all of its KEB shares in excess of 10%.

a. Initial Progress Prior to 10 March 2011 Supreme Court Reversal of Acquittals

575. On Monday, 13 December 2010, Hana submitted its application to the FSC for its purchase of a controlling interest in KEB.⁷⁸² The FSC announced that the application lacked certain relevant information. An FSC official told the press: "When Hana Financial Holdings thoroughly prepares the relevant documents and we consider that it would not give any influence over financial solidity, the final authorization may be immediately given without preliminary authorization within 60 days."⁷⁸³
576. However, by the end of the month, "numerous" politicians had joined civic groups in protesting the sale of KEB to Hana.⁷⁸⁴ According to Mr. [REDACTED] the then President of KEB:

*After the Hana sale was announced in 2010, the union began staging daily demonstrations, occupying the lobby of KEB headquarters, filing lawsuits, and threatening strikes. The union even tried to prevent KEB's compliance with Hana's due diligence requests in connection with the acquisition by physically barring our personnel from certain offices and threatening employees who provided the requested information to Hana. **The Korean government made no effort to address the union's disruptive activity. To the contrary, numerous Korean politicians attended the union's protests at KEB headquarters to support the union's effort to derail the Hana sale.***⁷⁸⁵ [emphasis added]

577. The Respondent contends that regulators continued to work on the Hana application in January through late February 2011. The FSC and FSS requested supplementary materials from Hana, which Hana provided.⁷⁸⁶ In February, the FTC analysed Hana's application

⁷⁸² J. H. Sohn First Witness Statement, para. 9 ("Hana submitted its application for approval to acquire control of KEB on December 13, 2010."); **Exhibit C-230**, "Hana Financial Group Applies for Preliminary Approval for Korea Exchange Bank Acquisition on December 13" *Newspim*, 15 December 2010 ("According to the Financial Supervisory Commission (FSC) today, Hana Financial Holdings applied for the preliminary authorization on the 13th day of the month.").

⁷⁸³ **Exhibit C-230**, "Hana Financial Group Applies for Preliminary Approval for KEB Acquisition on December 13," *Newspim*, 15 December 2010.

⁷⁸⁴ **Exhibit C-785**, "Lawmakers To Look into Korea Exchange Bank Deal," *The Korea Times*, 29 December 2010.

⁷⁸⁵ **Exhibit CWE-020**, Second Witness Statement of [REDACTED] 22 September 2014 ("**Second Witness Statement**"), para. 7.

⁷⁸⁶ **Exhibit C-856**, Hana Financial Group, Submission of Supplementary Materials, 16 January 2012; **Exhibit R-109**, Hana Financial Group, Submission of Supplementary Materials, 27 January 2012; **Exhibit R-098**, FSS, Request for

for monopoly and competition issues.⁷⁸⁷ Hana provided the FSC with its financing plan by the end of that month.⁷⁸⁸ On 28 February 2011, *Yonhap News* headlined an article “Financial authorities are expected to approve the acquisition of KEB by Hana Financial Group on March 16, 2011,”⁷⁸⁹ although an FSC press release the same day clarified that “the review process has not been specifically scheduled and that we have made no decision about whether to approve the application.”⁷⁹⁰

578. On 2–3 March 2011, similar stories appeared in the media about the likelihood of Hana’s acquisition to be approved at the FSC’s upcoming 16 March 2011 meeting.⁷⁹¹ Mr. [REDACTED] the then-President of KEB, considered approval to be likely:

Supplementary Material for the Application for Preliminary Approval of Incorporation of KEB as a Subsidiary, 1 February 2011; **Exhibit R-544**, Cover Letter to Hana Supplementary Submission.

⁷⁸⁷ J.H. Sohn First Witness Statement, para. 9:

By the time I joined the Financial Systems Team in February 2011, the FSC had sent the application to the Fair Trade Commission for an analysis of effects on competition under the Monopoly and the Fair Trade Act, while the FSS already had commenced its examination process under the Financial Holding Companies Act.

Exhibit CWE-003, [REDACTED] First Witness Statement, para. 26:

Moreover, the FSC’s longstanding pretext—that Lone Star was the subject of ongoing investigations—was at that point very weak, because the former bank and government officials who had been charged with wrongdoing in connection with Lone Star’s investment in Korea Exchange Bank had all been acquitted, and [REDACTED] LSF-KEB, and KEB had been acquitted of the charges against them relating to KEB’s rescue of KEB Card. Consequently, the FSC finally seemed prepared to act on Hana’s application, notwithstanding these still lurking allegations (which, in any event, had nothing to do with Hana itself).

⁷⁸⁸ **Exhibit CWE-003**, [REDACTED] First Witness Statement, para. 9.

⁷⁸⁹ **Exhibit C-294**, “Approval Expected on March 16 for Hana Financial Group Acquisition of KEB” *Yonhap News*, 28 February 2011:

The financial industry confirmed on February 28, 2011 that the Financial Services Commission (FSC) would grant its approval for the application for the inclusion of KEB in Hana Financial Group as a subsidiary thereof at the FSC regular meeting on March 16, 2011, regardless of a recent decision to postpone the listing of new shares by Hana Financial Group.

An official of FSC said, “As the sale price has been paid in full, there is no problem for the grant of the approval next month. The regular meeting will be held on March 16, not March 2.”

⁷⁹⁰ **Exhibit R-087**, Press Release from Financial Services Commission regarding submitting Hana’s application for the Commissioner’s Review, 28 February 2011.

⁷⁹¹ **Exhibit C-231**, “Lone Star Qualifications and Korea Exchange Bank Sale to have Parallel Review,” *Korea Economic Daily*, 2 March 2011; **Exhibit C-232**, “Financial Services Commission Takes Final Steps to Complete Korea Exchange Bank Sale,” *Korea JoongAng Daily*, 3 March 2011.

*Around the same time [9 March 2011], the FSC signaled its intent to approve Hana's application by putting it on the agenda of an upcoming meeting on March 16. It was my understanding, shared by everyone else involved, that putting the issue on the agenda reflected the regulators' intention to approve the application. (If the FSC intends to deny an application, they communicate that to the applicant, and the applicant withdraws their application rather than losing face with a direct negative decision.)*⁷⁹² [emphasis added]

579. In a 10 March 2011 press release, the Federal Trade Commission announced that it approved Hana's acquisition as being compliant with Korea's monopoly regulations.⁷⁹³ Hana also chose that day to respond to the FSS request for further information of 1 February 2011.⁷⁹⁴

b. 10 March 2011 – The Supreme Court Decision

580. On 10 March 2011, the Korean Supreme Court allowed the prosecution appeal, vacating the acquittals of Mr. [REDACTED] KEB and LSF-KEB Holdings SCA, and remanding the case to the Seoul High Court.⁷⁹⁵ By 11 March 2011, [REDACTED] had been told by Lone Star's lawyers at Kim & Chang that the FSC had already met to discuss the fate of Hana's application in light of the Supreme Court's decision.⁷⁹⁶
581. The Supreme Court's Reasons for Decision signaled that Lone Star would likely be found guilty of stock price manipulation. Mr. Joo Hyung Sohn, who gave evidence on behalf of the FSC, framed the issue in his First Witness Statement: "[I]f Lone Star were punished for the financial crime of stock price manipulation, it would become ineligible to continue to hold an excess shareholding in KEB, and thus the FSC would need to order Lone Star to sell that excess shareholding."⁷⁹⁷ The FSC could permit the Hana deal to proceed, but according to Mr. Sohn, to do so would risk undermining its own deterrence mandate by

⁷⁹² Exhibit CWE-003, [REDACTED] First Witness Statement, para. 26.

⁷⁹³ Exhibit C-419, "KFTC decided that the acquisition by Hana Financial Holding of Korea Exchange Bank does not limit competition," *FTC Press Release*, 10 March 2011. See also Exhibit CWE-003, [REDACTED] First Witness Statement, para. 26 ("On March 9, 2011, the Fair Trade Commission, Korea's antitrust regulator, gave its approval.")

⁷⁹⁴ Exhibit R-544, Cover Letter to Hana Supplementary Submission; TD6, 1532:6-9.

⁷⁹⁵ Exhibit C-233 / R-151, Supreme Court Judgment, Stock Price Manipulation.

⁷⁹⁶ Exhibit C-909, Email from [REDACTED] to [REDACTED] 11 March 2011.

⁷⁹⁷ J.H. Sohn First Witness Statement, para. 13.

letting Lone Star escape regulatory sanction were Lone Star later to be convicted.⁷⁹⁸ Nevertheless, the FSC postponed any decision on Hana's application and it requested further information and documents from Hana.⁷⁹⁹

c. *Hana Officials Meet FSC Officials Following the Supreme Court Decision*

582. Lone Star contends that a meeting took place between the FSC's Chairman, Mr. S.D. Kim, and Hana's Chairman, Mr. [REDACTED] shortly after 10 March 2011, at which point the FSC Chairman suggested to the Hana Chairman that Hana would stand a better chance of securing the FSC approval if there was a reduction in price.⁸⁰⁰ The characterisation of the meeting is denied by the Respondent, and the then-Chairman of the FSC, Mr. S.D. Kim, testified that he made no such suggestion.⁸⁰¹ The Claimants did not challenge this testimony during his cross-examination.

⁷⁹⁸ J.H. Sohn First Witness Statement, para. 13.

⁷⁹⁹ TD6, 1532:10–1533:8.

⁸⁰⁰ Exhibit C-949, ICC Award, para. 92. Hana Chairman [REDACTED] testified before the ICC tribunal as follows:

Hana's view was that the issue of Lone Star's disqualification was separate from Hana's Application, not least because Lone Star had not yet been convicted. I tried to convince the FSC Chairman to take the same view. During my meeting with the FSC Chairman, he indicated that the FSC was undertaking a legal review of the situation and that the final decision on Hana's Application was for the FSC to make, which it would do in due course. The FSC Chairman mentioned that the FSC was under a lot of public and political pressure at the time. However, it was clear to me that if the pressure were to be reduced then he would not be opposed to working toward finalizing the approval of the transaction. Hence, I inferred from our conversation that he would need the Parties' help in overcoming the hurdles he faced. However, the FSC Chairman did not suggest – and I did not think it appropriate to ask – what the Parties could do in this regard. [emphasis added]

Mr. [REDACTED] testified under cross-examination that as a result of his meeting with the FSC Chairman, "he formed the view that Hana would stand a better chance of securing the FSC's approval if there was a reduction in the price" (Exhibit C-949, ICC Award, para. 93).

⁸⁰¹ Second Witness Statement of Seok Dong Kim, 15 January 2015 ("S.D. Kim Second Witness Statement"), para. 20:

The Meeting with Mr. [REDACTED] began at 2:40 pm and could not have lasted more than 10 or 15 minutes, because I had another appointment with a former high ranking official in the Ministry of Finance beginning at 3 pm. I conveyed to Mr. [REDACTED] the FSC's basic position at the time, which was that the application would be decided according to law and principle, and that the ultimate decision was for the Commission to make. I would not have been in a position to say more than this because whether to give final approval for acquisition could only be decided by the Commission.

583. There were other contacts between Hana and the regulator. Hana's Mr. [REDACTED] and Mr. [REDACTED] met with Mr. Jaeseong Joo, Deputy Governor of the FSS unit of the FSC. Mr. [REDACTED] evidence was that "Mr. Joo did not disclose any options that the regulators may have been considering at that time."⁸⁰²

d. 16 March 2011 – The FSC Meeting

584. The Lone Star situation was discussed at the next FSC meeting.⁸⁰³ Much of the discussion related to Lone Star's NFBO status (a side issue eventually dropped by the FSC) but also a constitutional question about whether Lone Star could be found guilty under Article 215 of the *Securities and Exchange Act* if Mr. [REDACTED] were eventually convicted. Lone Star's lawyers contended that the Korean Constitution did not permit criminal liability to be attributed to a corporation for the acts or omissions of an agent such as [REDACTED]. There were precedents in the Korean Supreme Court striking down similar provisions.

e. 29 March 2011 – The Honolulu Meeting

585. Hana's Deputy President, Mr. [REDACTED] met with Lone Star's Mr. [REDACTED] in Honolulu, Hawaii on 29 March 2011 (the "**Honolulu Meeting**"). The signals from the judgment of the Supreme Court (which had been reserved since March 2008)⁸⁰⁴ created the expectation of an eventual conviction (which happened) of LSF-KEB of "a serious

⁸⁰² Second Witness Statement of [REDACTED] 16 January 2015 ("**[REDACTED] Second Witness Statement**"), para. 8:

As is mentioned in the transcript, I did have a meeting with an FSS official (Mr. Jaeseong Joo, then Deputy Governor of the FSS) after the Supreme Court's decision came out on March 10, 2011. In that meeting, I inquired about the FSS's position on possible implications of Lone Star's misconduct for the approval process. Mr. Joo responded that it was necessary for the FSS to conduct a legal review regarding Lone Star's eligibility as a major shareholder. I stated Hana's position that Hana's application should be decided without waiting for the results of such a review. This is all I had discussed with Mr. Joo. As far as I remember, Mr. Joo did not disclose any options that the regulators may have been considering at that time.

See also TD7, 1807:7-13 (Testimony of Mr. [REDACTED] "Rather than conveying the position of Hana, I asked what was the position of the financial supervisory authorities; and in that process, from Hana Bank's perspective, we had already submitted an application for approval, and I did convey that Hana Bank was hoping that the existing filing would be approved and would proceed as it had been submitted."

⁸⁰³ Exhibit C-928, Stenographic Records of the 5th Financial Services Commission Meeting (disclosed per Special Referee), 16 March 2011.

⁸⁰⁴ Memorial, para. 274.

financial crime.”⁸⁰⁵ A conviction would trigger an FSC order under Article 16-4(5) of the *Banking Act* against LSF-KEB to reduce its shareholding in KEB to 10% within at most 6 months.

586. During the Honolulu Meeting, Mr. [REDACTED] outlined Hana’s analysis of three possible approaches the FSC might adopt in response to the Supreme Court’s decision.⁸⁰⁶ The Claimants contend that this, too, proves Hana was coordinating closely with the FSC, because these were “essentially the same three options” the FSC considered internally several weeks later, as reflected in an internal FSC document.⁸⁰⁷ However, the Respondent says these were the only realistic scenarios available to the regulators, so it should come as no surprise to Lone Star that Hana was able to roughly predict them.⁸⁰⁸
587. The Respondent says that irrespective of whatever Mr. [REDACTED] said to Mr. [REDACTED] at the Honolulu Meeting, the allegation that in March 2011 the FSC was conditioning its approval of Hana’s application on a price reduction is contradicted by the sworn testimony in this arbitration of the responsible FSC officials, as well as each of the Hana executives who were said to be on the receiving end of this “message” from the FSC.⁸⁰⁹
588. Nevertheless, the surreptitious recording by Lone Star of the Honolulu Meeting records Mr. [REDACTED] attributing a very specific strategy to the FSC, although qualifying it by attributing the source to “my feeling.” Mr. [REDACTED] suggested that the FSC would like to show the public that Hana obtained a KRW 300 per share reduction. When Mr. [REDACTED] asked if the FSC made that position explicit, Mr. [REDACTED] replied that they had not, qualifying his denial by stating that the FSC had alluded to share price in

⁸⁰⁵ In this case, Articles 188(4)1 and 215 of the *Securities and Exchange Act* (Exhibit CA-095, Republic of Korea, *Securities and Exchange Act*, Law No. 8,985, partially amended 21 March 2008).

⁸⁰⁶ [REDACTED] Second Witness Statement, para. 7.

⁸⁰⁷ Reply, para. 195.

⁸⁰⁸ [REDACTED] Second Witness Statement, para. 7.

⁸⁰⁹ [REDACTED] Second Witness Statement, paras. 11-14; [REDACTED] Second Witness Statement, para. 5; S.D. Kim Second Witness Statement, paras. 19-23. The then-Chairman of the FSC, Mr. S.D. Kim, for example, has testified unequivocally that he never, at any time, delivered any “message” to Hana that he needed assistance overcoming public or political obstacles to approving the Hana transaction, and that he never, at any time, discussed the price of the transaction with Hana’s Chairman or anyone else at Hana.

pointing out that Hana could take advantage of the Additional Consideration clause to make it appear as though there was a real change.⁸¹⁰

⁸¹⁰ Exhibit C-479, Transcript of 29 March 2011 Meeting in Honolulu Between [REDACTED] and [REDACTED] ("Honolulu Meeting Transcript"), pp. 18-19. See also pp. 5, 10-11, 14-15, 18-19:

[REDACTED] *Uh, and the message deli-delivered to our Chairman [REDACTED] is, from him [the FSC Chairman] is, he is, he is really willing to do something to approve this transaction. But he also in need of, in a sense, assistance or help from us, uh, to wisely overcome the hurdles that he is facing with, especially related to public blame, or political blame that he might come up with when he approve this deal. So I believe that he is really willing to do something for us, but at the same time, we – if there is anything that we can help him to go through the whole, you know, task that we have to do something for him too. So that's the kind of situation.*

[REDACTED] *So, I think- I think, you know, the arguments that you just made, are the arguments we already made to FSC. But that's a kind of a [...] request of FSC in terms of assisting FSC to have kind of excuse. Or way out to approve this transaction. They haven't exactly mentioned what amendments to us.*

[REDACTED] *So, but just to understand how specific they were, they- they said if we take option three, we need an amendment that punishes Lone Star? Or...*

[REDACTED] *So...*

[REDACTED] *How do they justify that? How did they say it?*

[REDACTED] *My sense is, at least they can, they would like to say the terms are in favor [...] to Lone Star, because of, because of, the force sale. So the terms became unfavorable to Lone Star because of the force sale which I think, I presume, implies some adjustment of price. I don't think they are talking about like 100 million, 200 million, but rather symbolic. But again-, again, this option is not [...] most desirable option. We don't like this option. We would like to be more objective and more rational option [sic] which is number one. Or number two and separate approval option.*

[REDACTED] *Uh, if that was the real punishment, they may strongly request the huge, huge reduction of the purchase price. But what they gave impression to us is not that one. But rather they kind of indirectly gave impression that there may be some mechanism we can both utilize to make the deal to be changed superficially and therefore they can say that even though we order whole sale, we didn't approve the original SPA but rather changed SPA.*

[REDACTED] *But the additional 100 won is not in proportion to the dates. It's one month, one month. So what I thought is if the deal is being closed within the month of April, we can deliberately, deliberately close the deal in the month of May for example. Then 200 won, we can say we saved 200 won.*

And plus price reduction of 100 won which is a real reduction if, if we agree. Then we can say to the public that 300 won. I think that magnitude can justify FSC's decision to approve our transaction. That's our feeling based on our internal discussion.

[REDACTED] *But they said that?*

589. At the meeting, Mr. [REDACTED] also conveyed to Lone Star that Hana was desperate to close the transaction with Lone Star and that Hana was in close contact with the FSC Chairman:

[REDACTED] You know, as, as you [INDISCERNIBLE] probably one of the most desperate persons for this deal, and ah, because, you know, I am the very one who secured all the money, myself [...] in Korean won, debt financing – I did it. I did also the difficult 1.3 trillion won of equity financing myself. There are 36 investors secured, and uh, real headache if this deal does not go through. I don't know what to do myself. So I'm really desperate. Uh, I'm really upset with FSC these days, but uh, that's, you know the very unique characteristics of the government officials. So there are difficulties to deal with them. But Chairman [REDACTED] and I am exerting our best effort. Our Chairman [REDACTED] as far as I understand, he, at least talk to the Chairman of FSC almost every day.⁸¹¹ [emphasis added]

590. Following the FSC deferral of Lone Star issues at its 16 March meeting, Mr. [REDACTED] wrote to the FSC Chairman, Mr. S.D. Kim, on 3 April 2011 to advise that there was a deadline of 24 May 2011 and that the FSC's approval was the only impediment to completing the transaction. A refusal to allow Lone Star to dispose of its interest in KEB to Hana would serve no regulatory purpose, since the purpose of the regulations was to prevent unqualified owners from operating banks and Lone Star's sale of KEB would exit Lone Star from Korea and make its qualifications irrelevant. Mr. [REDACTED] also emphasised that even if [REDACTED] were to be later convicted, the constitutionality of imposing vicarious criminal culpability on Lone Star for [REDACTED] acts or omissions could result in another 2–3 years of litigation.⁸¹²

[REDACTED] No, they didn't say that. They didn't say that. But once they pointed that we Hana can take advantage of the additional consideration to make the change as real change even though it is not economically at least FSC can approve the transaction superficially with lower consideration. [emphasis added]

⁸¹¹ Exhibit C-479, Honolulu Meeting Transcript, p. 3.

⁸¹² Exhibit C-237, Letter from [REDACTED] to S.D. Kim, 3 April 2011:

We understand that the FSC feels that it must assess the impact of this Supreme Court decision on the proposed sale before it can move forward with its consideration of HFG's application. As we understand it, the question confronting the FSC is whether the FSC first must determine the status of KEB Holdings as the current major shareholder of KEB, before it can rule on whether HFG is qualified to be the new major shareholder of KEB. We respectfully submit that the clear answer to this question is, "No."

f. The FSC Becomes Increasingly Anxious About Public Opinion and Political Controversy

591. The FSC was scheduled to make its decision about Lone Star's status at its regular meeting on Wednesday, 20 April 2011.⁸¹³ The FSC produced a review of Lone Star's sale of KEB dated 19 April 2011.⁸¹⁴ This review raised the NFBO issue and acknowledged that "Lone Star could file a request for an international investment arbitration (ICSID) against Korean government due to the delay in the recovery of its investment."⁸¹⁵ The document also notes the FSC's awareness that the existing agreement had a deadline of 24 May 2011. The review makes no mention of Mr. [REDACTED] letter of 3 April 2011.
592. However, internal FSC documents show increasing FSC concern about juggling conflicting legal opinions on the LSF-KEB eligibility issue.⁸¹⁶ On the one hand, the FSC

[...]

Furthermore, no legitimate regulatory purpose can be served by refusing to allow that proposed sale to go forward on the basis that KEB Holdings may not be qualified to be the major shareholder of KEB. Even if that determination were finally reached – following the completion of the trial process, which will likely take another 2-3 years, and which Lone Star and [REDACTED] intend to vigorously defend (including, in KEB Holdings' case, a challenge in the Constitutional Court to the constitutionality of the criminal vicarious liability statute under which it has been charged, and which is similar to other criminal statutes that have already been found to be unconstitutional) – the sole remedy available to the FSC would be to order KEB Holdings to sell the majority of its stake in KEB within six months (to below 9%). But KEB Holdings is prepared to sell this stake right now – indeed it has already contracted to do so. [emphasis added]

⁸¹³ Exhibit C-477, "Lone Star Decision May Be Delayed," *Korea JoongAng Daily*, 25 April 2011 ("The Financial Services Commission had been scheduled to make its decision at its regular meeting on Wednesday.").

⁸¹⁴ Exhibit C-572, Financial Services Commission Examination Related to Lone Star Sale of KEB, 19 April 2011 ("FSC Examination of Lone Star Sale of KEB"); Exhibit C-764, Financial Services Commission and Financial Supervisory Service, Examination Related to the Lone Star's Sale of Korea Exchange Bank, April 2011 ("FSC and FSS Examination of Lone Star Sale of KEB"). Although highly similar, Exhibit C-572 does not mention Assemblyman Lim and mentions the NFBO with less detail than Exhibit C-764. On the other hand, Exhibit C-572 directly acknowledges Korea's possible exposure to ICSID investor-State liability if the Lone Star decision were to be delayed.

⁸¹⁵ Exhibit C-764, FSC and FSS, Examination of Lone Star Sale of KEB p. 1, 15 April 2011 ("Assemblyman Young-Ho Im [Lim] presented materials to prove that Lone Star is a non-financial business operator"); Exhibit C-572, FSC Examination of Lone Star Sale of KEB, p. 4 ("The assessment of Lone Star's eligibility as a major shareholder has been delayed since the end of 2006 due to the issue of a[n] NFBO (industrial capital), the trial on the KEB fire sale case, etc."), and p. 7.

⁸¹⁶ Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 7-10 ("At this moment, it is difficult to draw a conclusion because there are conflicting legal opinions on whether the eligibility requirements are met or not"); Exhibit C-764, FSC and FSS Examination of Lone Star Sale of KEB, pp. 6, 8; Exhibit C-581 Revised, FSC,

was worried about being accused of abetting Lone Star's "Eat and Run,"⁸¹⁷ while on the other hand, it faced criticism for the continuing delay.⁸¹⁸ There was no simple solution to end the controversy and thus the need to buy more time.⁸¹⁹ The FSC also noted that delay

Regarding the Acquisition of Korea Exchange Bank by Hana Financial Group, April 2011, pp. 3-4: [With regard to the FSC possibly approving the Hana application before the conclusion of the cases] "There is a burden of political controversies that the acquisition was approved despite legal uncertainties, thereby aiding and abetting Lone Star's eat and run and giving HFG preferential treatment. ... Political offense may arise, such as calls for National Assembly hearings or audits" [emphasis original].

⁸¹⁷ Exhibit C-572, FSC Examination of Lone Star Sale of KEB, p. 9 ("The government may be criticized for abetting Lone Star's eat and run by rushing the granting of the approval despite the legal uncertainties"); Exhibit C-764, FSC and FSS Examination of Lone Star Sale of KEB, p. 8.

⁸¹⁸ Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 8-10:

There is concern that the government may be criticized for avoiding responsibility due to the continuing postponement of a decision.

[...]

The government's original position was that it will decide whether to approve the sale after determining eligibility, and there is a possibility that the government may be criticized for changing its original position.

The government may be criticized for abetting Lone Star's eat and run by rushing the granting of the approval despite the legal uncertainties.

There is a concern that it may be criticized for reserving the judgment on Lone Star's eligibility if the court affirms a decision finding defendants guilty after the approval of the KEB sale is granted. [emphasis original]

Exhibit C-764, FSC and FSS Examination of Lone Star Sale of KEB, pp. 5, 7-8:

If the approval of the sale of KEB is granted while there remain questions about Lone Star's eligibility as a large shareholder of KEB, a possible final and conclusive court decision to find Lone Star guilty in the future is expected to provoke criticisms against the government's policy decision.

Possible criticisms that the disposal order, etc. are only formalities to aid 'eat and run' by Lone Star and to accord favorable treatment to Hana Financial Group.

[...]

This option [Option 3] may provoke criticisms that the government aids and abets Lone Star's 'eat and run' by scheme by rushing to approve the sale of KEB despite the legal uncertainties.

This option [Option 3] may be criticized for reserving the judgment on Lone Star's eligibility if the court affirms a decision finding defendants guilty after the approval of the KEB sale is granted. [emphasis original]

⁸¹⁹ Exhibit C-764, FSC and FSS Examination of Lone Star Sale of KEB, p. 5:

This option [expeditious completion of the approval process] may lead to controversy over the government's support for the so-called 'eat-and-run' by Lone Star and unduly favorable treatment to Hana Financial Group.

This option [expeditious completion of the approval process] may lead to controversy that the government changed its original position to complete the approval process after making its decision on Lone Star's eligibility as large shareholder of KEB. [emphasis original]

“could have a negative impact on Korea’s international creditworthiness due to overseas investors’ loss of confidence in Korea’s investment environment, etc.”⁸²⁰

593. The FSC’s review shows that it considered three options:

- (a) “Postpone the determination on Lone Star’s Eligibility and Approval on Acquisition Until the Court’s Final Decision;”
- (b) “Denial of Eligibility and Sale Order + Approval on Acquisition;” and
- (c) “Reserve Decision on Eligibility + Approval on Acquisition.”⁸²¹

594. The Tribunal notes that conspicuous by its absence from this list of options is approval of LSF-KEB eligibility and/or approval of the Hana acquisition.⁸²²

595. The Claimants argue that Hana and the FSC must have been in close communication in this period because internal FSC documents pose the same three options as conveyed by Hana representatives during the Honolulu Meeting. In his Hearing testimony,

⁸²⁰ Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 7, 9:

○ *Lone Star could file international investment arbitration (ICSID) against Korean government due to the delay in the recovery of its investment.*

* *This could have a negative impact on Korea’s international creditworthiness due to overseas investors’ loss of confidence in Korea’s investment environment, etc.* [emphasis original]

* * * * *

○ *It is necessary to prevent adverse effects of delay in the approval on the financial industries and Korea’s creditworthiness abroad.* [emphasis original]

* *Korea’s creditworthiness abroad may be adversely affected by continuing uncertainties of the financial industries due to a protracted delay in the KEB sale, growing international sentiment that Korea is very hostile to foreign capital, etc.*

See also, Exhibit C-764, FSC and FSS, Examination of Lone Star Sale of KEB, 15 April 2011, p. 8:

○ *It is necessary to prevent adverse effects of delay in the approval on the financial industries and Korea’s creditworthiness abroad.* [emphasis original]

* *Korea’s creditworthiness abroad may be adversely affected by continuing uncertainties of the financial industries due to a protracted delay in the KEB sale, growing international sentiment that Korea is very hostile to foreign capital, etc.*

⁸²¹ Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 7-9.

⁸²² See D.G. Sung First Witness Statement, paras. 14-16; J. H. Sohn First Witness Statement, para. 15. Neither of these Witness Statements shed light on why the FSC did not consider approval of eligibility and approval of the acquisition as a factor during its review in April 2011.

Mr. [REDACTED] testified that “[f]rom the FSC, I had never heard that they were considering such scenarios. In their wake, or after the Supreme Court ruling, we were thinking of the possible implications of the Supreme Court ruling on our approval prospects, and we received legal advice from law firms. And through that exchange, we came to think that such three scenarios would be possible.”⁸²³ However, it seems the third option came from the FSC because when asked: “Just so this is clear, this [the third option] was an option that was explicitly mentioned by the FSC to Hana; is that right?” Mr. [REDACTED] confirmed “[T]hat is correct. However, I didn’t hear it directly. I heard it through our legal counsel, law firm.”⁸²⁴

596. The decision that the FSC was to make at its regular meeting on 20 April 2011 was postponed. In a media report from the following week, the FSC cited the NFBO issue that Assemblyman Lim had raised on 15 April 2011 as the reason for its delay in deciding.⁸²⁵
597. On 12 May 2011, the FSC announced that it would continue to wait and see in light of the conflicting legal opinions it had received from outside legal experts.⁸²⁶ The FSC

⁸²³ TD7, 1822:15-22.

⁸²⁴ TD7, 1827:17-22.

⁸²⁵ Exhibit C-477, “Lone Star decision may be delayed,” *Korea JoongAng Daily*, 25 April 2011:

The Financial Services Commission had been scheduled to make its decision at its regular meeting on Wednesday.

“The FSC had planned to deal with it in April, but a suspicion recently raised by Representative Lim triggered a change,” a high-ranking FSC official said. “A review of the facts involving the allegations is still under way.”

The official referred to Lim Young-ho, a lawmaker from the conservative opposition Liberty Forward Party, who recently rekindled skepticism [sic] over Lone Star’s status as a financial-oriented investor.

⁸²⁶ Exhibit C-241 / R-092, FSC Briefing on KEB, 12 May 2011, p. 1:

As a result of such review, the outside legal experts are currently giving conflicting opinions on Lone Star Fund’s eligibility as a major shareholder.

Given that there are conflicting opinions among outside legal experts as to Lone Star’s eligibility as a major shareholder of KEB and further that judicial proceedings are under way, it is, at this point in time, difficult to make a final determination as to the Lone Star’s eligibility as a major shareholder.

Taking into account the foregoing circumstances, we decided to wait and see the progress status of the ongoing judicial proceedings among others in making determination of whether to approve Hana Financial Group’s (“HFG”) application for inclusion of KEB in its subsidiaries’ group. [emphasis added]

spokesperson told reporters that “FSC collected as many opinions of legal experts as possible,” providing no further details.⁸²⁷ The spokesperson also cited “uncertainties.”⁸²⁸

598. Following this press conference, media commentators stated that the FSC had fallen victim to “Yang-Ho [Byeon] Syndrome,”⁸²⁹ a sarcastic Korean idiom referring to the delay of a policy decision for fear of being held accountable⁸³⁰ and named after the official who was involved in the sale of KEB shares to Lone Star in 2003 and was eventually acquitted in the November 2008 KEB Share Acquisition Case.⁸³¹
599. More importantly, one of the May 2011 articles reporting on the Yang-Ho Byeon Syndrome also reported the following exchange between National Assembly members and the FSC’s Chairman:

⁸²⁷ Exhibit C-241 / R-092, FSC Briefing on KEB, 12 May 2011, p. 2:

[Q.] You said FSC sought legal opinions and there were differences in them. Please give us details on who were for and against the grant of the approval.

[A.] FSC collected as many opinions of legal experts as possible. I am afraid I cannot give you such details at this moment.

⁸²⁸ Exhibit C-241 / R-092, FSC Briefing on KEB, 12 May 2011, p. 3:

There was the round-table meeting this morning. As there have been many speculations from the market and media after FSC announced its decision on March 16, and uncertainties remain about the acquisition of KEB by Hana Financial Group, FSC decided to postpone its decision based on the results of the several round-table meetings and opinions of external experts and I announced such decision today.

⁸²⁹ Exhibit C-242, “Korea Exchange Bank M&A, Blocked by the ‘Byeon Yang-ho Syndrome,’” *Edialy News*, 12 May 2011; Exhibit C-243, “Seok-Dong Kim raises the white flag to ‘Yang-ho [Byeon] Syndrome,’” *JoongAng Daily*, 14 May 2011; Exhibit C-244, “Where is the End to ‘Byeon Yang-ho Syndrome,’” *Aju Business Daily*, 18 May 2011.

⁸³⁰ Exhibit C-243, “Seok-Dong Kim raises the white flag to ‘Yang-ho [Byeon] Syndrome,’” *JoongAng Daily*, 14 May 2011 (“He sent a signal that he would never be affected by so-called ‘Yang-Ho [Byeon] Syndrome[.]’ (delaying policy decision for fear of being held accountable).”).

⁸³¹ Exhibit C-244, “Where is the End to ‘Byeon Yang-ho Syndrome,’” *Aju Business Daily*, 18 May 2011. The Claimants stressed the alleged pervasiveness of the “Byeon Syndrome” in their 14 October 2020 presentation (see TD22, 15:20–16:11):

Director Byeon had been prosecuted and his career destroyed, although he was ultimately acquitted for his relatively minor role in the FSC’s approving Lone Star’s original investment in KEB. The FSC officials had to consider whether they would face the same fate if they followed Korean law and allowed Lone Star to leave with the full profits from its KEB shares sale.

The Byeon syndrome was real and debilitating. Political pressure won and the rule of law lost. And in the process, Korea breached the BIT.

The story is the same with respect to Korea’s taxation of Lone Star. Korean politicians, civic groups, and the public at large demanded that the NTS tax Lone Star.

The biggest pressure came from the National Assembly. The minority party members of the National Policy Committee warned, "if the Financial Services Commission allows Lone Star to get away with unreasonably high profits without any penalty, the National Assembly will hold a hearing to hold the FSC to account, and request an audit on the FSC to the Board of Audit and Inspection of Korea and file a complaint with the prosecution." The members of the majority party, who [FSC Chairman] SD Kim expected to defend him from the offensive of the minority parties, just stood by, and some of them even sided with the minority parties. Chung Wa Dae consistently distanced itself from the issue, emphasizing its "non-intervention principle."⁸³² [emphasis added]

g. Hana and Lone Star Move to Solidify Their Commitment

600. Hana and Lone Star representatives met in Tokyo on 18 May 2011.⁸³³ Messrs. [REDACTED] and [REDACTED] from Lone Star and Messrs. [REDACTED] and [REDACTED] from Hana attended the meeting.⁸³⁴
601. The parties negotiated two things: a six-month extension for the SPA extending the deadline to 30 November 2011;⁸³⁵ an interim step whereby Hana Bank and Hana Financial Group would each acquire 5% of KEB shares accompanied by a USD 1 billion loan from Hana to Lone Star, using Lone Star's remaining 41.02% stake in KEB as collateral.⁸³⁶ The

⁸³² Exhibit C-243, "Seok-Dong Kim raises the white flag to 'Yang-ho [Byeon] Syndrome,'" *JoongAng Daily*, 14 May 2011.

⁸³³ [REDACTED] First Witness Statement, para. 8:

From Hana's perspective, we wanted to extend the SPA so that, once the legal issues were resolved, we could go ahead and consummate the transaction. Having observed both Kookmin Bank and HSBC suddenly withdraw their respective applications, Hana was aware of the delicate nature of the proposed transaction, and sought ways to solidify the parties' commitment. Thus, on May 18, 2011, we met with Lone Star executives in Tokyo and suggested that Hana Financial Group and Hana Bank each purchase five percent of KEB shares from Lone Star, which, in total (i.e., 10 percent), was the maximum amount that could be acquired without triggering a regulatory approval. This idea had the benefit not only of confirming the parties' commitment to the acquisition, but also of making KEB less attractive to Hana's foreign competitors, who would not be as interested in purchasing less than a majority interest in KEB. [emphasis added]

[REDACTED] First Witness Statement, para. 6 ("On May 18, 2011, approximately a week after the FSC announced its decision to postpone its review of the application, Hana and Lone Star met in Tokyo to discuss what the parties intended to do with the SPA."); [REDACTED] First Witness Statement, para. 11.

⁸³⁴ [REDACTED] First Witness Statement, para. 6.

⁸³⁵ [REDACTED] First Witness Statement, para. 12 ("Hana and Lone Star ultimately agreed to extend the SPA for another six months. Accordingly, the expiration of the SPA was extended from May 25, 2011 to November 30, 2011"); Exhibit R-292 FSS, Hana Financial Group's Review of Extension of KEB Stock-Secured Loan, 23 May 2011.

⁸³⁶ Exhibit R-292, FSS, Hana Financial Group's Review of Extension of KEB Stock-Secured Loan, 23 May 2011; Exhibit C-245, Email from [REDACTED] to [REDACTED] 25 May 2011.

parties did not re-negotiate the share purchase price at that time.⁸³⁷ In November 2010, KEB's shares were trading at KRW 12,300.⁸³⁸ Hana's November 2010 offer was KRW 14,250; the increased share price represented a control premium. By May 2011, KEB's shares had dropped 20%,⁸³⁹ while Hana's offer price was still KRW 14,250, meaning that the control premium, as a percentage of the market price, had roughly tripled.

⁸³⁷ Exhibit C-245, Email from [REDACTED] to [REDACTED] 25 May 2011:

(Agreed)

10% Acquisition and Share Pledged Loan Facility

Under the condition that the 10% purchase will be completed prior to June 30, 2011, and therefore, we will be entitled to receive the 2nd Q dividend, the sale price will be increased to KRW 14,250 / share.

[...]

(To be further discussed)

[...]

Amendment to SPA- 41% Acquisition

Sale price of KRW 14,250 / share with no adjustment in connection with any Expected 2011 2nd and 3rd Q dividend amount.

⁸³⁸ Exhibit C-778, "Background of FSC's Decision to 'order unconditional sale of KEB shares,'" *Dong-A-Ilbo*, 29 September 2011 ("The price of a KEB share as of [28 September 2011] is KRW 7,200, which decreased by 41% from the price at the time of execution of the purchase agreement in November [2010] (KRW 12,300).").

⁸³⁹ Exhibit CWE-014, [REDACTED] First Expert Report, para. 64 and Figure 4:

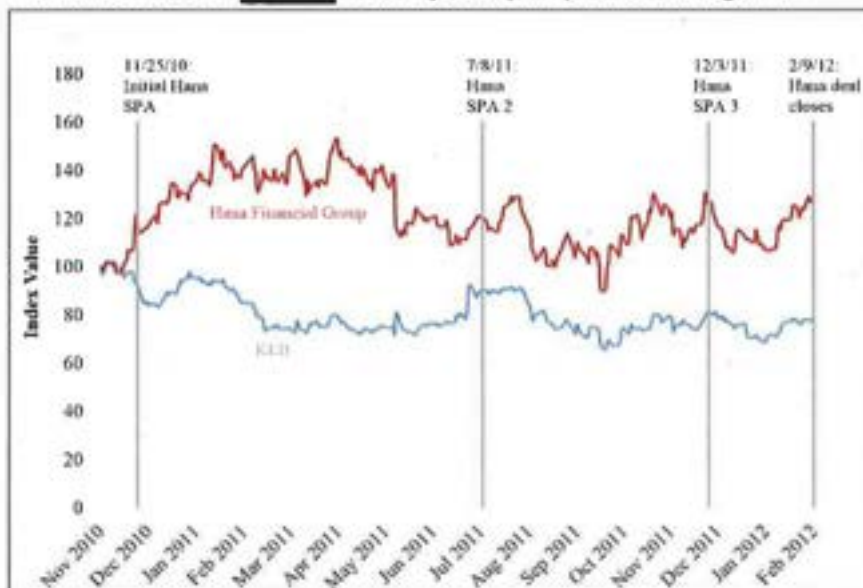


Figure 4. Performance of KEB vs. Hana Stock (Nov. 1, 2010 – Feb. 9, 2012). Indexed to 100 at Nov. 1, 2010. Dividends Re-Invested.

602. Hana wished to publicly signal its commitment to complete the acquisition and make KEB a less attractive takeover target.⁸⁴⁰ Thus both Hana Financial Group and Hana Bank would each purchase 5% of KEB's shares from Lone Star. This was the maximum amount that could be acquired without regulatory approval.
603. The joint 10% purchase of KEB stock did not progress smoothly. Hana reconsidered whether to proceed.⁸⁴¹ On 26 May 2011, the FSC contacted Hana about this potential purchase.⁸⁴² Mr. [REDACTED] was "incredulous" about the alleged "pressure" the FSC was exerting on Hana despite his view that these 5% purchases should not attract regulatory attention.⁸⁴³

⁸⁴⁰ [REDACTED] First Witness Statement, para. 8:

Thus, on May 18, 2011, we met with Lone Star executives in Tokyo and suggested that Hana Financial Group and Hana Bank each purchase five percent of KEB shares from Lone Star, which, in total (i.e., 10 percent), was the maximum amount that could be acquired without triggering a regulatory approval. This idea had the benefit not only of confirming the parties' commitment to the acquisition, but also of making KEB less attractive to Hana's foreign competitors, who would not be as interested in purchasing less than a majority interest in KEB.

Exhibit CWE-006, [REDACTED] First Witness Statement, para. 34:

Recognizing that completion of the sale would take more time, Hana proposed to reinforce the parties' commitment to the deal by acquiring in advance 10% of KEB's shares—with Hana Financial Group and Hana Bank each acquiring 5%, which was the maximum amount of KEB shares that the Hana Financial Group could acquire without government approval.

See also [REDACTED] First Witness Statement, para. 6; **Exhibit CWE-007,** [REDACTED] First Witness Statement, para. 62.

⁸⁴¹ [REDACTED] First Witness Statement, paras. 14-15 ("We continued to debate the merits of the proposal internally, and also were seeking legal advice from outside counsel on various issues related to the proposal"); Second Witness Statement of [REDACTED] 16 January 2015 ("[REDACTED] **Second Witness Statement**"), paras. 7-8 ("These were the reasons Hana eventually decided not to pursue the interim share purchase, not any pressure from the regulators.").

⁸⁴² **Exhibit CWE-007,** [REDACTED] First Witness Statement; **Exhibit C-784 / R-327,** FSC, Review on the Partial Acquisition of Korea Exchange Bank Shares by Hana Financial Group, etc., 26 May 2011.

⁸⁴³ **Exhibit CWE-006,** [REDACTED] First Witness Statement, para. 35:

I was incredulous when, within a day or two of reaching this agreement, I heard from [REDACTED] a senior officer at Hana and my principal contact for this transaction, that the FSC had pressured Hana not to proceed with the interim share purchases—even though the government had no authority over these transactions.

Exhibit CWE-007, [REDACTED] First Witness Statement, para. 67:

Shortly after the meeting in Tokyo, however, Hana informed us that the FSC had pressured Hana not to proceed with the two 5% share purchases and that—despite the fact that the FSC had no authority to make such demands—Hana had acquiesced.

604. Hana's witnesses disputed Lone Star's allegation of FSC pressure.⁸⁴⁴ According to Mr. [REDACTED] the substance of the 26 May 2011 communication was that the FSC noted that the purchase at KRW 14,250 was 50–60% higher than the current market price of KRW 8,900, and making a purchase at that price would cause Hana Financial Group to throw away about USD 313 million (KRW 345 billion).⁸⁴⁵
605. Hana Chairman [REDACTED] stated that Hana Financial Group made an internal decision not to proceed. The 10% acquisition was discussed at two board meetings in May and June 2011. The board sought external legal advice from multiple law firms, and concluded that paying a share price that was at least 50% higher than the market price could be a breach of its fiduciary duty to shareholders.⁸⁴⁶

⁸⁴⁴ [REDACTED] Second Witness Statement, para. 7 ("I understand that Lone Star has alleged again that Hana changed its mind about the interim share purchase only as the result of pressure from the regulators. Again, this is not correct"); [REDACTED] First Witness Statement, para. 15 ("To be clear, the final decision not to move forward with the interim share purchase plan was a business decision made independently by Hana, without any coercion or pressure on the part of the FSC.").

⁸⁴⁵ [REDACTED] First Witness Statement, para. 14:

On or around May 25, 2011, in exercising its supervisory role of monitoring financial holding companies, the FSS asked Hana to be vigilant about the risk that its planned purchase of 10 percent shares in KEB at a premium could negatively affect Hana's financial soundness. The FSS's explanation was that if Hana purchased 10 percent of KEB shares at KRW 14,250, which was 60% higher than the then-market price of Korea Exchange Bank shares (i.e., KRW 8,900), it could cause Hana to lose approximately KRW 345 billion (USD 313 million).

⁸⁴⁶ [REDACTED] Second Witness Statement, paras. 7-8:

However, as we began to think more about it, we grew increasingly concerned that proceeding in this manner could raise various issues. One such issue was a concern that purchasing 5% of KEB shares from Lone Star at a price at least 50% higher than the then-market price of KEB shares could lead to claims by Hana shareholders that Hana's directors and officers had breached their fiduciary duties to Hana's shareholders. We discussed this issue at length at two separate Hana Financial Group Board meetings, in May and June 2011, during which certain Board members voiced strong concerns about the possibility of such claims. The concerns were serious enough that Hana even sought outside legal advice, from multiple law firms, to analyze this issue.

While the Hana Board was concerned about the possibility of breach of fiduciary duty, we came to gain confidence that we would be able to extend the SPA for another six months, and thus there was no longer any real need for the interim share purchase. These were the reasons Hana eventually decided not to pursue the interim share purchase, not any pressure from the regulators.

h. June 2011 – KEB Declares a USD 937 Million Dividend

606. In June 2011, Lone Star directors caused the KEB Board to declare a USD 937 million (KRW 1 trillion) dividend.⁸⁴⁷ On 30 June 2011, regulators asked KEB not to pay this dividend. Records from the KEB Board show that 90% of this dividend was made up of extraordinary profits obtained from KEB's sale of its shares in Hyundai Engineering & Construction.⁸⁴⁸ The regulators' documents show they knew about the profits from the sale of Hyundai E&C, but they had concerns about public opinion⁸⁴⁹ and KEB's capital requirements.
607. On 27 June 2011, Mr. [REDACTED] spoke with Mr. [REDACTED] of Hana on the phone, leaving Mr. [REDACTED] with the understanding that after the FSS learned about the extraordinary dividend, they called Mr. [REDACTED] of Hana to urge a lower price for KEB as a result of the dividend.⁸⁵⁰ [REDACTED] denies having received such a call from the FSC.⁸⁵¹ Mr. [REDACTED]

⁸⁴⁷ Exhibit C-813, "S. Korea Regulators Meet Korea Exchange Bank CEO Over Dividend Plan," *Reuters*, 30 June 2011: ("South Korean regulators said on Friday that they had requested Korea Exchange Bank (KEB) refrain from paying out high dividends, as the bank is set to hold a board meeting amid reports top shareholder Lone Star is seeking total dividend payouts of some 1 trillion won (\$937 million).")

⁸⁴⁸ Exhibit R-393, Minutes of 1 July 2011 6th Meeting of KEB Board of Directors: ("The dividend payout ratio is high this quarter because about 90% of the dividends resulted from the extraordinary gains from the sale of the shares in Hyundai Engineering & Construction ('Hyundai E&C').")

⁸⁴⁹ Exhibit R-283, Issues Related to Korea Exchange Bank Dividend, 30 June 2011, p. 2 ("Critical public opinion may raise risk of negative perception and tarnished reputation.")

⁸⁵⁰ Exhibit C-483, Email from [REDACTED] to [REDACTED] 1 July 2011:

Thanks for getting all of the loan docs done today. I talked with [REDACTED] from Hana Bank and thanked him as well. They are exhausted from dealing with the various government entities (FSS, FSC, BOK, etc.) who are making their life very difficult.

[REDACTED] mentioned that immediately after the KEB dividend was approved, a mid-management guy from the FSS called [REDACTED] (spelling?) at Hana's holding company and asked him what change in Hana's pricing of KEB would result from the dividend. [REDACTED] explained that we were still in negotiation so no definitive answer.

The FSS guy then said that Hana should negotiate a price that is 14,250 less, dollar for dollar, the dividend paid. [REDACTED] was taken a bit by surprise that the regulator would be discussing their pricing. Apparently, the regulators are afraid that they'll be blamed for Lone Star taking this dividend as a result of their delay, and are hoping that they can say that the dividend didn't result in Lone Star getting more money.

⁸⁵¹ [REDACTED] Second Witness Statement, para. 12:

I do not recall having any conversation with anyone from the FSS (or the FSC) regarding the mid-year KEB dividend. If I had had such a discussion, there would

██████ memory of his 27 June 2011 call with Mr. ██████ differs from Mr. ██████ contemporaneous e-mail⁸⁵² as does ██████⁸⁵³

608. The KEB dividend was paid in July 2011.⁸⁵⁴

i. 8 July 2011 – The Parties Sign an Amended SPA

609. An amended SPA was signed on 8 July 2011.⁸⁵⁵ It had a share price of KRW 13,390 per share, down from KRW 14,250 per share in the November 2010 SPA, resulting in a decrease in the purchase price from USD 4.4 billion to USD 4.1 billion.⁸⁵⁶ The reduction was said to reflect the mid-year dividend of KRW 1,510 per share and an upward adjustment of KRW 650 to reflect second and third quarter performance.⁸⁵⁷

have been a record of it on my calendar or in my notebook, email, or files. I have checked my files and can find no reference to such a discussion. I also certainly would remember such a discussion, given how unusual it would have been for the regulator to use such language. To my knowledge, the financial regulators never suggested to me or anyone else at Hana that Hana should negotiate a reduction in the price to offset any dividends.

⁸⁵² ██████ Second Witness Statement, para. 16:

I recall having a phone call with Mr. ██████ on or about June 27, 2011 regarding the finalization of the loan agreement and Hana's decision not to proceed with the interim share purchase proposal. However, what I remember to have told Mr. ██████ was that Hana had decided not to pursue the interim share purchase plan because of concerns about potential claims against Hana's directors and officers for breach of fiduciary duty. I believe I also told Mr. ██████ that I had heard indirectly that the regulators had indicated that pursuing the interim share purchase along with the loan agreement would make the loan agreement something short of an ordinary loan agreement. Mr. ██████ was beside me when I spoke with Mr. ██████ listening on the speaker phone.

⁸⁵³ ██████ Second Witness Statement, paras. 9-10.

⁸⁵⁴ Exhibit CWE-003, ██████ First Witness Statement, para. 17.

⁸⁵⁵ Exhibit C-250, Second Amendment to SPA Between Lone Star and Hana.

⁸⁵⁶ ██████ First Witness Statement, para. 12:

The sale price was adjusted downward from KRW 4.7 trillion (approximately USD 4.4 billion, or 14,250 Won per share) to KRW 4.4 trillion (approximately USD 4.1 billion, or 13,390 Won per share), after reflecting the decision made on July 1, 2011 that Lone Star would receive from KEB a large first-quarter dividend of 1,510 Won per share, and the expected increase in net asset value of KEB for the second and third quarters of 2011.

⁸⁵⁷ ██████ Second Witness Statement, para. 14:

The share price in the amended SPA that we signed on July 8, 2011 (i.e., 13,390 Korean won) was the product of deducting the mid-year dividend amount of 1,510 Korean won per share from the original SPA sales price per share of 14,250

610. The proposed loan from Hana to Lone Star proceeded. As the interim share purchases were cancelled, Lone Star was able to pledge its entire 51.02% stake in KEB, thereby obtaining from Hana a USD 1.4 billion (KRW 1.5 trillion) loan rather than the USD 1 billion (KRW 1.1 trillion) loan initially contemplated.⁸⁵⁸

611. In September 2011, there were press reports in which Hana officials were quoted as having said that Hana was planning to renegotiate the price of its deal with Lone Star in light of the recent fall in the KEB share price and Lone Star's likely conviction for stock price manipulation.⁸⁵⁹

j. 6 October 2011 – LSF-KEB is Convicted of Stock Price Manipulation

612. On 6 October 2011, as expected, the Seoul High Court convicted Mr. [REDACTED] and LSF-KEB of stock price manipulation; KEB was found not guilty.⁸⁶⁰ On 12 October 2011, LSF-KEB announced it would not appeal,⁸⁶¹ despite earlier talk of a constitutional challenge.

k. 7 October 2011 – National Assembly FSC Testimony

613. The day following the conviction, FSC Chairman Kim testified before a committee of the National Assembly. The politicians appreciated that the base share price was determined by the market but some of them vigorously protested the control premium which, the politicians complained, now amounted to an uplift to 85% as a result of the declining price of KEB shares.

614. The transcript of the National Assembly illustrates some of the hostility to the control premium:

Korean won, and then raising the price by 650 Korean won per share to reflect second and third quarter performance. Thus, practically speaking, the amended SPA price was an increased sales price.

⁸⁵⁸ Exhibit C-249, Loan Agreement Between LSF-KEB Holdings SCA and Hana Bank, 1 July 2011.

⁸⁵⁹ Exhibit R-302, "Hana's Under-the-table Work For Korea Exchange Bank Acquisition in Full Action," *Herald Economy News*, 7 September 2011; Exhibit R-303, "Seung-Yu Kim, 'Korea Exchange Bank Purchase Price Is Variable,'" *Korea Economic Daily*, 28 September 2011; Exhibit R-304, "Chairman Seung Yu Kim Hints Possible Renegotiation of Korea Exchange Bank Purchase Price," *E-Today*, 28 September 2011.

⁸⁶⁰ Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation.

⁸⁶¹ Exhibit C-257, Letter from [REDACTED] to S.D. Kim, 12 October 2011.

[Assemblyman] *Che-chang Ooh*: [...] *I would like to raise [...] the excessive sale price that I mentioned earlier. [...] If it is assumed that a premium is usually given 20~30%, the price must be 8,500~9,000 won. But 13,300 won? Then about more than 1.5 trillion won is paid. So the premium for this 13,390 won is as high as 85%. Such payment cannot happen, never. This is breach of duty under civil and criminal laws. Breach of duty.*

[...]

*This is not only a legal issue in civil and criminal laws but also a political issue, and if the Financial Services Commission, which must check the management stability and capital adequacy of banks, leaves the situation as it is, this is clearly a breach of duty. I would like to clearly say that, very clearly.*⁸⁶² [emphasis added]

* * * * *

*This should not be the case. Selling with 85% of the premium for the management right... this, indeed, Korea ... This is not acceptable. Never.*⁸⁶³ [emphasis added]

* * * * *

[Assemblyman] *Seung Duk Ko*: [...] *Problems are serious now. Issues related to the [NFBO issue] would of course be a big problem, but I think the terms of the contract are very unfair. Currently, the share price is about at 7,300 won, but the acquisition price is set over 13,000 won. [...] This does not make any sense. [...] Would the Korean public be convinced of that?*⁸⁶⁴ [emphasis added]

Some Members of the National Assembly thus made clear its hostility to the possibility that Lone Star would walk away with the contractually agreed control premium for its shares.

615. FSC Chairman Kim told the politicians that the price of the Hana transaction was a matter for the private parties to decide, as follows:

⁸⁶² Exhibit C-696, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, pp. 21-22

⁸⁶³ Exhibit C-696, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, p. 21.

⁸⁶⁴ Exhibit C-696, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, p. 24.

And with regard to the sale contract of KEB shares signed between Hana Financial Group and Lone Star, the contract itself is basically something the concerned parties of the contract must make a decision [...].

However, when pressured on “[h]ow such a ridiculous contract [which did not allow the buyer to renegotiate the price] could be made possible in Korea,” the FSS Chairman concedes, “[o]k, I will try to grasp the circumstances.”⁸⁶⁵

616. Lone Star contends that the statements by Assemblymen Che-chang Ooh and Seung Duk Ko demonstrate not only the substance of the FSC’s and FSS’s concern about public opinion, but also a warning to the FSC and FSS not to allow the deal to proceed at its current price. The FSC fear of a political reprisal goes back, the Claimants say, to the HSBC transaction in 2008.⁸⁶⁶
617. The Respondent says this testimony shows that the FSC and the FSS were bravely standing up to political pressure, but the Claimants argue that the agencies were grandstanding to give the appearance of propriety. In the Claimants’ view, the National Assembly pushed the FSC and the FSS to seek a reduction in share price to a level agreeable to the politicians.
618. The Hana witnesses say Hana decided to seek a price renegotiation *independent of and prior to* the 7 October 2011 hearing.⁸⁶⁷

L 12 October 2011 – Lone Star Announces it will not Appeal Convictions on KEBCS Stock Price Manipulation Charges

619. On 12 October 2011, Mr. [REDACTED] wrote a letter to the FSC Chairman stating that LSF-KEB would not appeal the decision rendered by the Seoul High Court on 6 October 2011. Mr. [REDACTED] further writes:

With the Court’s decision as to LSF-KEB Holdings in this matter now final, we understand the Commission will now rule on the pending

⁸⁶⁵ Exhibit C-696, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, pp. 23-25.

⁸⁶⁶ TD22, 150:13-17:

Both FSC chairmen who testified in this case confirmed that intense political and public pressure existed at the time. FSC Chairman Jun told the U.S. Ambassador in June 2008 that he would “take a hit” if he pushed for approval of HSBC’s application.

⁸⁶⁷ [REDACTED] Second Witness Statement, para. 12; [REDACTED] Second Witness Statement, para. 18.

application of Hana Financial Group to acquire a majority of KEB's outstanding shares from LSF-KEB Holdings (and the Korea Export-Import Bank). As you are aware, that contract is binding on Hana Financial Group and LSF-KEB Holdings through November 30, 2011, but after that time may be terminated at any time by either party. Given that Hana Financial Group's application has been pending before the Commission for almost a year, we look forward to the Commission's prompt action on the application, and certainly before the end of November.

If there is anything we can do to facilitate the Commission's review of Hana Financial Group's application, please do not hesitate to contact me.⁸⁶⁸

m. 25 October 2011 – The FSC Compliance Order

620. The FSC issued the Compliance Order on 25 October 2011. Mr. [REDACTED] testified that a few days later, on 28 October 2011, he received a call from his contact at Hana, Mr. [REDACTED] [REDACTED] advising him that the FSC wanted Hana to renegotiate a new sale price that was sufficiently lower to give the FSC the political cover to appear that they had punished Lone Star and so could approve the deal.⁸⁶⁹ Mr. [REDACTED] understanding of his conversation with

⁸⁶⁸ Exhibit C-257, Letter from [REDACTED] to S.D. Kim, 12 October 2011.

⁸⁶⁹ TD3, 937:21–952:19; Exhibit CWE-023, Second Witness Statement of [REDACTED] 24 September 2014 (“[REDACTED] Second Witness Statement”), paras. 22-26. See also Memorial, para. 294, referring to Exhibit C-263, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011; Exhibit C-264, Email from [REDACTED] to [REDACTED] and [REDACTED] 29 October 2011 (Mr. [REDACTED] reported the following to Messrs. [REDACTED] and [REDACTED] [emphasis added by this Tribunal]):

- October 28, 2011: “The FSC has asked Hana to approach us to renegotiate the price of our contract downward. The [FSC] realize they should approve the deal, but don[']t want to be criticized for allowing Lone Star to make too much profit.
I told him that the FS[C] should request this directly to us rather than going through Hana. He said that the FS[C] could not propose this to us since the request is improper because it is not within their scope to set the price. He said that is why they are doing it through Hana verbally rather than in writing.
He said that [C]hairman [REDACTED] was told this directly by the FS[C].”
- October 29, 2011: “[REDACTED] reiterated that the FS[C] was pushing them to reduce the price. He said that Hana was happy that it was a good price and is anxious to close the deal as it is, and their request for a reduction is only because of the FS[C] demands.”
- November 1, 2011: “[REDACTED] repeated what he said last time: that the FSC was pressuring them to renegotiate a lower price to ‘give them an excuse’ to approve the deal. I, of course, told him that the sale order should be excuse enough.”

Mr. [REDACTED] is found in an email he sent to Messrs. [REDACTED] and [REDACTED] on 28 October 2011.⁸⁷⁰ Mr. [REDACTED] denies Mr. [REDACTED] version of the conversation.⁸⁷¹

n. 28 October 2011 – Hana Warns Lone Star that “We Should Find a Way to Alleviate Political Pressure on the FSC”

621. On 28 October 2011, Hana Chairman [REDACTED] sent an email to Lone Star Chairman [REDACTED] [REDACTED] advising of the existence of “increasing voices” among labour unions, civic organisations and politicians arguing for a “punitive forced sale by Lone Star” which, the Hana Chairman claimed, Hana had thus far successfully opposed. Hana and Lone Star would have to “submit a new contract,” because the existing contract had not been “entered in accordance with the [Disposal] order” and “in submitting a new contract we should find a way to alleviate political pressure on FSC in approving the transaction, especially by ‘a reduced price’ reflecting market valuation and turbulent financial industry.” He stated that the FSC cannot be expected to issue an approval “with the existing contract.”⁸⁷² However, according to the Hana Chairman’s First Witness Statement:

⁸⁷⁰ Exhibit C-263, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011.

⁸⁷¹ [REDACTED] First Witness Statement, para. 14:

Hana decided to seek a price reduction from Lone Star solely for its own business reasons. I understand that Lone Star has alleged that the FSC pressured Hana to seek a price reduction. That is simply not true. The FSC never asked or pressured me to renegotiate the price terms with Lone Star.

⁸⁷² Exhibit C-262, Email from [REDACTED] to [REDACTED] 28 October 2011:

It’s been a year since we first signed the SPA and I hope we could close the transaction soon with amicable relationship. As we expect FSC’s sale order notification to be made in next week, I am writing to you to share my view on the current situation and necessary actions for a coordinated closing of our transaction.

It is regrettable that the Seoul High Court’s final verdict was not in favor of you, and FSC has subsequently given you a fulfilling order with a short remedy period. However, I believe this is a gesture by FSC that they would like to resolve the situation as soon as possible, if they could find a way without being blamed.

After the court verdict, there are increasing voices that a punitive measures [sic] should be applied to Lone Star. It is not only KEB labor union, but NGOs/civil activists and politicians who argue for a punitive forced sale by Lone Star. Some politicians have claimed that the existing contract should be nullified and National Assembly should pass a new law for punitive sale measures. They claimed that Lone Star was in-eligible in its original purchase of KEB and reaps excessive premium from the current market price. Moreover, Mr. Sohn, a head of the opposition party, publicly declared at the KEB labor union rally last Sunday that the current contract between Hana and Lone Star should be invalidated and

*To be clear, these were all Hana's ideas. I did not discuss the content of this email with anyone at the FSC or the FSS [...] I did not take any requests or orders from the government in renegotiating the SPA with Lone Star.*⁸⁷³

622. Confronted with this letter at the Hearing, Hana Chairman ██████ flatly contradicted the most significant passage he had written in the letter: "Otherwise ['In submitting a new contract, we should find a way to alleviate political pressure on FSC in approving the transaction, especially by reflecting market valuation and turbulent financial industry'], FSC cannot be expected to proceed to an approval of the existing contract." Asked at the Hearing [with a confusing double negative], "So, it's not a true statement that the FSC cannot be expected to proceed to an approval with the existing contract; is that right?" The Hana Chairman answered, "That's right."⁸⁷⁴ The contrast between the Hana Chairman's letter and his testimony goes to the issue of his general credibility.

a. 29 October 2011 – A Similar FSC Communication is Delivered by Hana's ██████ to Lone Star's ██████

623. The same day that Hana Chairman ██████ sent his letter to Mr. ██████ i.e., 28 October 2011, Mr. ██████ of Hana called Mr. ██████ of Lone Star. In his Witness Statement, Mr. ██████ acknowledged that "Hana believed that reducing the purchase price could

his party would strongly urge the government to make a punitive sale order. Considering political situations in Korea (i.e., recent loss of Seoul Mayor position by the ruling party, National Assembly election in April next year, Presidential election in December next year, etc), I believe that we would face increasing stronger political resistance, unless we strive to expedite the closing of our transaction.

Despite an increasing demand for a punitive sale order, Hana has persuaded FSC that such an order would not be applicable in this situation. But, even if a normal sale order is made by FSC, we are required to submit a new contract, as the existing contact was not entered in accordance with the sale order. In submitting a new contract, we should find a way to alleviate political pressure on FSC in approving the transaction, especially by reflecting market valuation and turbulent financial industry. Otherwise, FSC can not [sic] be expected to proceed to an approval with the existing contract.

I believe it would be mutually beneficial if we could close the transaction at the earliest possible time by doing so. I appreciate your cooperation to date and hope that we both do our best to complete the last part of our transaction. [emphasis added]

⁸⁷³ ██████ First Witness Statement, para. 19.

⁸⁷⁴ TD6, 1677:1-20.

alleviate the political pressure on the FSC and improve the outlook for regulatory approval.”⁸⁷⁵

624. Mr. [REDACTED] however, says that Mr. [REDACTED] went further in the call and attributed the pressure to the FSC:

[REDACTED] relayed directly to me the FSC's pressure on Hana to renegotiate the contract price during phone calls on October 28 and 29, and again on November 1, 2011, which I reported in emails to [REDACTED] and [REDACTED] of Lone Star. I refreshed my memory of these calls by reviewing these three emails.

During our call on October 28, [REDACTED] explained that the FSC had asked Hana Chairman [REDACTED] to approach Lone Star to reduce the contract price, and that the FSC officials knew that they should approve the deal, but they did not want to be criticized for allowing LSF-KEB to make too much profit. I told [REDACTED] that, rather than going through the purchaser, the FSC should have made this request to LSF-KEB directly. [REDACTED] responded to me, however, that the FSC could not make that demand directly because it was not within the FSC's scope of authority to set a price for the sale. According to [REDACTED] the FSC chose to make its demand through Hana, and only verbally, because it knew that any pressure by the regulator to reduce the contract price was improper.⁸⁷⁶ [emphasis added]

625. On 28 and 29 October and again on 1 November 2011, Mr. [REDACTED] sent three emails to Mr. [REDACTED] and Mr. [REDACTED] in which he relayed what he said was the substance of successive calls received from Mr. [REDACTED]

Guys,
I talked with [REDACTED] [sic] from [H]ana today. He explained the following:

The FSC has asked Hana to approach us to renegotiate the price of our contract downward. The fsa [sic] realize they should approve the deal, but don[']t want to be criticized for allowing Lone Star to make too much profit.

I told him that the FSA [sic] should request this directly to us rather than going through Hana. He said that the FSA [sic] could not propose this to us since the request is improper because it is not within their scope to

⁸⁷⁵ [REDACTED] First Witness Statement, para. 18.

⁸⁷⁶ Exhibit CWE-023, [REDACTED] Second Witness Statement, paras. 22-23.

set the price. He said that is why they are doing it through Hana verbally rather than in writing.

He said that chairman [redacted] [sic] was told this directly by the FSA [sic]. Let's discuss this when you get a chance.⁸⁷⁷ [emphasis added]

* * * * *

Guys, I had another talk with [redacted] of Hana Bank this morning. He didn't have any different information than yesterday. He reiterated that the FSA [sic] was pushing them to reduce the price. He said that Hana was happy that it was a good price and is anxious to close the deal as it is, and their request for a reduction is only because of the FSA [sic] demands. I'll let you know if I hear anything else.⁸⁷⁸ [emphasis added]

* * * * *

Guys, [redacted] from Hana Bank called me last night. He repeated what he said last time: that the FSC was pressuring them to renegotiate a lower price to "give them an excuse" to approve the deal. I, of course, told them that the sale order should be excuse enough. Nothing different from last time.

I'll talk with each of you on the phone.⁸⁷⁹ [emphasis added]

626. Mr. [redacted] also attributes to Mr. [redacted] on 29 October 2011 the statement that "Hana was happy that was a good price and is anxious to close the deal as it is."⁸⁸⁰ Mr. [redacted] [redacted] seemingly wished to portray the FSC not Hana as the moving force behind the pressure for a price reduction.⁸⁸¹

⁸⁷⁷ Exhibit C-263, Email from [redacted] to [redacted] and [redacted] 28 October 2011.

⁸⁷⁸ Exhibit C-264, Email from [redacted] to [redacted] and [redacted] 29 October 2011.

⁸⁷⁹ Exhibit C-267, Email from [redacted] to [redacted] and [redacted] 1 November 2011.

⁸⁸⁰ Exhibit C-264, Email from [redacted] to [redacted] and [redacted] 29 October 2011.

⁸⁸¹ Judge Brower makes the following comments: Mr. [redacted] testified in his First Witness Statement, that "[w]e first conveyed this rationale for lowering the purchase price to Lone Star on October 28, 2011" ([redacted] First Witness Statement, para. 17).

When submitting this Witness Statement, Mr. [redacted] was not aware that the meeting between him and Mr. [redacted] in Honolulu, Hawaii on 29 March 2011 had been recorded. It stands to reason, in evaluating such testimony, that a person in the position of Mr. [redacted] when speaking with Mr. [redacted] of Lone Star, and totally ignorant of the fact that the conversation is being recorded, would indeed be telling the truth. The transcript from the recording clearly shows that Mr. [redacted] first informed Lone Star that the FSC would not approve the acquisition except at a lower price than had been negotiated between Hana and Lone Star not on 28 October 2011 but already seven months before then, on 29 March 2011. See Exhibit C-479, Honolulu Meeting Transcript, pp. 4, 10-11, 14-15:

[redacted] Uh, and the message deli- delivered to our Chairman [redacted] is, from him [the FSC Chairman] is, he is, he is really willing to do something to approve

this transaction. But he also in need of, in a sense, assistance or help from us, uh, to wisely overcome the hurdles that he is facing with, especially related to public blame, or political blame that he might come up with when he approved this deal. So I believe that he is really willing to do something for us, but at the same time, we – if there is anything that we can help him to go through the whole, you know, task that we have to do something from him too. So that's the kind of situation.

██████████ *So, I think- I think, you know, the arguments that you just made, are the arguments we already made to FSC. But that's a kind of a [...] request of FSC in terms of assisting FSC to have kind of excuse. Or way out to approve this transaction. They haven't exactly mentioned what amendments to us.*

██████████ *So, but just to understand how specific they were, they- they said if we take option three, we need an amendment that punishes Lone Star? Or...*

██████████ *So...*

██████████ *How do they justify that? How did they say it?*

██████████ *My sense is, at least they can, they would like to say the terms are in favor [...] to Lone Star, because of [...] the force sale. So the terms became unfavorable to Lone Star because of the force sale which I think, I presume, implies some adjustment of price. I don't think they are talking about like 100 million, 200 million, but rather symbolic. But again [...] this option is not [...] most desirable option. We don't like this option. We would like to be more objective and more rational option [sic] which is number one. Or number two and separate approval option.*

██████████ *Uh, if that was the real punishment, they may strongly request the huge, huge reduction of the purchase price. But what they gave impression to us is not that one. But rather they kind of indirectly gave impression that there may be some mechanism we can both utilize to make the deal to be changed superficially and therefore they can say that even though we order whole sale, we didn't approve the original SPA but rather changed SPA.*

Mr. ██████████ tries to explain away this inconsistency in his Second Witness Statement, claiming that the statement was taken out of context (██████████ Second Witness Statement, para. 10). However, it clearly shows the inaccuracy of Mr. ██████████ First Witness Statement. Furthermore, returning to Mr. ██████████ recorded discussion of 29 March 2011, first of all, he states, "The FSC is in- taking 3 scenarios into consideration right now" (Exhibit C-479, Honolulu Meeting Transcript, p. 4). This further evidence of Hana's secret work with the FSC is confirmed in the references to "option three:" "We would like to be more objective and more rational option which is number one" and "[o]r number two and separate approval option" (Exhibit C-479, Honolulu Meeting Transcript, pp. 10-11). Interestingly, an FSC internal document (Exhibit C-572, FSC Examination of Lone Star Sale of KEB), dated just three weeks after this conversation, 19 April 2011 and entitled "Review Regarding Lone Star's Sale of KEB," reflects the same three options (albeit with different numbering) to which Mr. ██████████ had been referring. Recall, too, that this document was created many months before the Seoul High Court decision on 6 October 2011 finally convicting and fining LSF-KEB KRW 25 billion for violating the *Securities and Exchange Act* (Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation). The three options listed in that internal FSC document were (1) "Postpone the determination of Lone Star's Eligibility and Approval on Acquisition Until Court's Final Decision;" (2) "Denial of Eligibility and Sale Order + Approval on Acquisition;" and (3) "Reserve Decision on Eligibility + Approval on Acquisition" (Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 7-9). In his Hearing testimony, Mr. ██████████ first testified that "[f]rom the FSC, I had never heard that they were considering such scenarios. In their wake, or after the Supreme Court ruling, we were thinking of possible implications of the Supreme Court ruling on our approval prospects, and we received legal advice from law firms. And through that exchange, we came to think that such three scenarios would be possible" (TD7, 1822:15-22). Nevertheless, when asked "Just so this is clear, this [the third option] was an option that was explicitly mentioned by the FSC to Hana; is

p. 2 November 2011 – Conversation between Hana and FSC Chairman

627. On 2 November 2011 (just four days after Hana Chairman [REDACTED] 28 October 2011 letter to Mr. [REDACTED] Hana Chairman [REDACTED] met with FSC Chairman S.D. Kim. The meeting was just four weeks prior to the end of the SPA lock-up period on 30 November 2011. FSC Chairman Kim describes the meeting in his First Witness Statement:

For this reason, [Hana Chairman] Mr. [REDACTED] asked me whether the approval would be granted within November. In response, I said to him that the review process would proceed in accordance with law. Also, I repeatedly emphasized that whether to approve the application rested on the commission's decision and thus, I could not comment on it.⁸⁸²

q. Hana Pushes on with its Approval Application

628. Mr. Sohn, the FSC team leader responsible for processing Hana's application telephoned Mr. [REDACTED] of Hana in early November 2011⁸⁸³ to ask if Hana intended to proceed with the application.⁸⁸⁴

that right?" He confirmed, "That is correct. However, I didn't hear it directly. I heard it through our legal counsel, law firm" (TD7, 1827:17-22).

⁸⁸² S.D. Kim First Witness Statement, para. 21.

⁸⁸³ TD7, 1860:7-9 (Testimony of Mr. J.H. Sohn) ("I don't recall the exact date. But, in 2011, in late October or in early November, I contacted the then-Team Leader [REDACTED] and 1861:5-7 ("Yes. As stated in my statement in Paragraph 18, that was the gist of my communication with the then-Team Leader, [REDACTED] J.H. Sohn First Witness Statement, para. 18:

Hana sent a status report to the FSC on November 14, 2011, a copy of which can be found at Exhibit C-271. When I received it, however, I was surprised to see that Hana had gone beyond the scope of what I had requested. I had asked [REDACTED] simply to inform us whether Hana intended to continue the SPA with Lone Star. Instead, the report contained what, in my view, was irrelevant and unnecessary information. Particularly, I thought it was improper that the report discussed certain groups' views against Lone Star receiving 70-80% higher than the KEB stock price, the public demand for a so-called "punitive" sale order, or Hana's efforts to negotiate a lower price. Such information was irrelevant to the FSC's decision-making process, and could be misconstrued (as I understand Lone Star has done in this arbitration) to suggest that the FSC had encouraged Hana to seek a reduction in the purchase price, when in fact the FSC had done no such thing. I was flustered when I received Hana's report, as I had not taken any actions regarding the sale price, either in requesting the status report or at any other point.

⁸⁸⁴ Mr. [REDACTED] of Hana and Mr. J.H. Sohn of the FSC agree that this contact was via a telephone call from Mr. Sohn to [REDACTED] see TD7, 1789:6-13 (Testimony of Mr. [REDACTED] TD7, 1860:5-9 and 1866:15-18 (Testimony of Mr. J.H. Sohn). See also J.H. Sohn First Witness Statement, para. 17:

629. Mr. [REDACTED] at the receiving end of the phone call with Mr. Sohn, wrote in his First Witness Statement:

There were various speculative media reports about the negotiations between Hana and Lone Star, and about whether the parties would continue the SPA beyond the November 30, 2011 date, after which either party could terminate the agreement. With respect to these speculative news articles, the FSC wanted a status update from Hana, the applicant. Mr. Sohn at the FSC asked about Hana's plan regarding the acquisition of KEB, and asked that Hana submit its official position in writing. It seemed to me that the FSC was planning to process Hana's application according to Hana's intention to continue with the share purchase agreement.⁸⁸⁵

630. Mr. [REDACTED] wanted to defer confirming Hana's intentions until after a meeting between Hana and Lone Star that was scheduled to be held on 11 November 2011 in London. According to the testimony of [REDACTED]

In this November 11th meeting we had a plan to present a new price; and accordingly, Lone Star's reaction is something that we had in mind, and we wanted to present the result, and that was contained in our report.⁸⁸⁶

631. On 6 November 2011, while waiting for Hana's response, a document titled "Main issues on Lone Star" was prepared at the FSC in which the FSC assessed different options Hana

Accordingly, my team immediately proceeded with the procedures necessary for the approval of Hana's application. This was consistent with the FSC's prior position announced on May 12, 2011 that the FSC would process Hana's application after observing the judicial proceedings. The SPA termination date was approaching, and after the compliance order was issued, there were news articles reporting that Hana planned to renegotiate the SPA with Lone Star, and other various speculations about whether Hana intended to go forward with the acquisition. Thus, for a speedy resolution of the approval review, I contacted Mr. [REDACTED] my primary contact at Hana regarding Hana's application, and inquired about Hana's position, i.e., whether Hana intended to proceed with its application for approval. [REDACTED] responded that he would consult the Hana executives and report back to me. I requested that Hana submit its official position in writing.

Mr. Sohn also testified during the Hearing (TD7, 1861:14-17):

Q. And all you wanted really to know was whether Hana was going to proceed or not with its application at that point; is that right?

A. Yes, that's correct.

⁸⁸⁵ [REDACTED] First Witness Statement, para. 20.

⁸⁸⁶ TD7, 1792:5-9.

could pursue without incurring liability to Lone Star. Under the heading "Regarding Share Disposal Order" it is noted:

1) *<Timing> To smoothly withdraw the application for inclusion of a subsidiary submitted by Hana Financial, issuing the disposal order needs to be postponed until after the term of agreement between Lone Star and Hana Financial Group (November 30).*

- *When the withdrawal is made within the term of agreement, there is a possibility that Hana Financial Group is deemed to fail to fulfill its duty to obtain an approval, which results in breach of the obligations (*) to perform material condition under the agreement.*

() "(Performance of material condition) "Each party ... including reasonable efforts to obtain all approvals and licenses required by applicable laws and regulations for the closing of this transaction."*

(o) It is concerned that Hana Financial Group is deemed to fail to perform its obligation to acquire approvals, and it is possible that Hana's contract deposit (44.1 billion) be confiscated and makes compensation for damages

- *Even though the withdrawal of the application within the term of the agreement is practically impossible, in case of imposing the disposal order, Lone Star will pull every string to bring pressure (threatening to file a claim including international lawsuit and political pressure, and etc.) to the supervisory authority. [emphasis in original]*
- *Furthermore, the authority no longer has pretext for delaying the approval on inclusion of a subsidiary (it is possible to delay the approval before the disposal order is made, doing a review on whether to issue a punitive disposal order as grounds for delay) [emphasis added]*
- *However, since it is difficult to delay the timing until after November 30 without a reason, as an alternative, consider bringing the item in a FSC meeting to be held on November 16, and hold off the decision to the next committee meeting (It is also necessary to postpone FSC meeting scheduled on November 30 to December).⁸⁸⁷ [Claimants' translation] [emphasis in original]*

The Claimants emphasise the part of the note that says:

** Furthermore, the authority no longer has pretext for delaying the approval on inclusion of a subsidiary (it is possible to delay the approval*

⁸⁸⁷ Exhibit C-786 / R-515, FSC, Main issues on Lone Star. The Parties dispute the translation of this passage. While the Claimants submit that the correct translation is "pretext," the Respondent submits that the correct translation is "justify."

before the disposal order is made, doing a review on whether to issue a punitive disposal order as grounds for delay).

But the Respondent disputes the translation.⁸⁸⁸

632. The Claimants point out that if the FSC was serious about a “hands off” approach, it would not have been engaged in assessing Hana’s options to avoid liability. Mr. Sohn testified to never having seen this document before this arbitration.⁸⁸⁹
633. No other FSC witness was produced to explain why the strategic considerations, which Respondent now argues were irrelevant to the FSC deliberations, would be spelled out in internal FSC documents.
634. The Claimants argue that it is not credible that Mr. Sohn, the FSC leader with respect to the Hana application, would not have been aware of such internal FSC considerations. In their view, the FSC document offers probative evidence that in November 2011 the FSC was concerning itself with the “private” matters of Hana’s contract with LSF-KEB and that the FSC was collaborating with Hana to find ways to delay the approval process and penalise Lone Star while avoiding Hana’s exposure to liability for failing to secure the FSC’s approval.

r. 11 November 2011 – The Hana Letter: Time is Short

635. On 11 November 2011, Hana Chairman [REDACTED] wrote to Mr. [REDACTED] that “considering current political dynamics and election schedules, we think December would be the last

⁸⁸⁸ Rejoinder, para. 569. The Respondent argues:

Specifically Claimants allege that in a November 2011 FSC document titled “Main Issues on Lone Star” which Claimants submitted as Exhibit C-786, the FSC explained that “the authority no longer has a pretext for delaying the approval...” But the term “pretext” was Claimants’ self-serving translation of the Korean original. As illustrated in the corrected translation that Korea submits with this Rejoinder as Exhibit R-515, the document’s proper translation into English is “the authority will no longer have justification for delaying the approval...” Of course, the terms “pretext” and “justification” are fundamentally different. The former implies a motive to deceive or to mislead. The latter is a value-neutral term which refers to the basis or reason for something.

⁸⁸⁹ TD7, 1864:9-13 (“[U]ntil our legal counsel showed me this document, I was not aware of it, and I further have not written this document. Therefore, I have never considered or thought about the points mentioned in this document.”).

window for us to close the transaction” and to do so, “we would need to lower the price” in “our final efforts to win the [FSC] approval.”⁸⁹⁰

s. *11 November 2011 – London Meeting Between Hana and Lone Star*

636. Mr. [REDACTED] met Mr. [REDACTED] in London. Their talk was surreptitiously recorded by Mr. [REDACTED].⁸⁹¹ Mr. [REDACTED] indicated that Hana was attempting to persuade the FSC to issue an

⁸⁹⁰ Exhibit R-117, Letter from [REDACTED] to [REDACTED] 11 November 2011. The letter states:

As I have written to you in my previous e-mail, we would face increasing political risks, unless we strive to expedite the closing of our transaction. Considering current political dynamics and election schedules, we think December would be the last window for us to close the transaction.

*In expediting the closing, I believe that we would need to lower the price to KRW *****/share (about **% from the current contract price of KRW13,390/share), so that we could contain political pressure and get the process [to] proceed. Compared to the total proceeds of the original agreement of the last year, total proceeds with a new price, together with 2011 1H dividend, would not significantly different [sic]. While this may not be perfectly satisfactory to you, I would like to make it clear that I am not taking a position to negotiate a price in the interests of Hana and regard this as our final efforts to win the approval. Even if the transaction is closed at a lower price than originally agreed, I would be personally blamed for collaborating with Lone Star's exit but I am ready to face such criticism.*

⁸⁹¹ Exhibit C-268, Lone Star-[REDACTED] Meeting Transcript, pp. 1, 3, 13-14, 16:

[Hana's] Chairman [REDACTED] has [a] real good connection with [the] regulators, especially the head of FSC. And [he] persuaded and persuaded and persuaded that he [...], [FSC] Chairman Kim himself, [REDACTED] will take all the blame after the deal is being closed. [...] And I think that [FSC Chairman Kim] was persuaded. But with a condition, which is the justification; justification that the regulators should have to protect themselves at least.

So the rationale that we can think of with this number is, not seventy percent premium, but fifty percent over current market price.

[A]t the end of the day, what [the] objective is, how to persuade the regulators and, so that they feel comfortable. [...] To counter, to face with the potential blames to be on them. So um, as uh, you know, kind of mechanism, I should call it justification: why this price sh- [sic] can be taken, so yeah. I will...I will discuss this alternative...

Let me...review this alternative. [...] [T]his concept is feasible, workable to everybody, the premium level to be applied to, or the profit-sharing, uh, portion – the magnitude of the profit-sharing portion and dividend amount, absolute amount – should be discussed [...] I will review the mechanism first, [to see] whether it is workable to the regulators [...].

approval but the FSC was likely to acquiesce only "with a condition" of a reduction in the size of the control premium which Mr. [REDACTED] said "we [Hana] can think of ... not seventy percent premium, but fifty percent over current market price."⁸⁹²

You once told me that it's a negotiation between Lone Star and regulators, not with Hana. I think that's right. At the end of the day, we have to negotiate with the regulators. [emphasis added]

⁸⁹² Exhibit C-268, Lone Star-[REDACTED] Meeting Transcript, pp. 3, 10, 16:

[REDACTED] *If you, you know. As you clearly pointed out, there's no answer, right? Which is the right price? Fifty percent premium over the current market price okay? Not seventy percent? There's no, no answer, actually.*

[REDACTED] *Yeah.*

[REDACTED] *So, so that's the difficulty.*

[REDACTED] *So tell me again. What is it about this number...*

[REDACTED] *This number.*

[REDACTED] *He makes Chairman [REDACTED] he must have had the discussion with [REDACTED]* [indiscernible]

[REDACTED] *I believe so. But I don't think he explicitly talked over this specific number with him. 'Cause that's probably the area that the regulators may like to avoid. Because the price, right?*

[REDACTED] *Because it...but it's illegal for them to even be having this discussion.*

[REDACTED] *They will find other excuses if they think that...you know, if really, the price is the heart of the matters, then I think not the price. They will find other excuses for them to have to delay the approval process. I am sure about that because that's what they did twice in March. So...*

[REDACTED] *And what's important? The headline number, the price per share - that's what's important?*

[REDACTED] *Yeah. So, the rationale that we can think of with this number is, not seventy percent premium, but fifty percent over current market price.*

* * * * *

[REDACTED] *I'm taking your 11-9. That's the number you and Chairman [REDACTED] came up with. So I'm, I'm picking that number, saying, "We can do that." But we have to get the upside. We have to get our side back. If the stock price doesn't go up, you don't pay anything.*

* * * * *

[REDACTED] *Ah. You once told me that it's a negotiation between Lone Star and regulators, not with Hana. I think that's right. At the end of the day, we have to negotiate with the regulators. But it is fortunate that they will not negotiate with your [PH] sell.*

[REDACTED] *Yeah.*

[REDACTED] *So whether us...*

[REDACTED] *Because what they're doing is illegal. And they don't mind if you know they're doing, they're conducting illegal activity. They don't want us to know.*

[REDACTED] *That is, that is why there is no proof that they are asking price reduction.*

637. During the meeting, Hana's ██████ made reference to a possible price reduction to KRW 11,900.⁸⁹³ This was the price eventually accepted by Lone Star at the London meeting two weeks later, on 25 November 2011:

Ultimately, we came to an agreement that the headline price would drop to KRW 11,900 per share (for which Hana Chairman ██████ thought he could obtain FSC Chairman Kim's informal support).⁸⁹⁴

638. Mr. ██████ stated that the objective is "how to persuade the regulators" and "at the end of the day we have to negotiate with the regulators."⁸⁹⁵
639. In a later portion of the 11 November transcript, Mr. ██████ appears to agree with Mr. ██████ proposition that what the FSC is "doing is illegal" and the FSC does not want Lone Star "to know" of its involvement but Mr. ██████ says, "[t]hat's my own speculation."⁸⁹⁶

█████ *Right.*

█████ *That is why. They are ver- very careful. They really do not want to be, uh, so that's the difficulty that we have.*

█████ *So, so you think they know they're breaking the law. But they're just, because of that they're careful not to leave evidence.*

█████ *That, that may be true. That's my own speculation. [emphasis added]*

⁸⁹³ The Korean Government was closely following developments; see, e.g., TD7, 1778:18-1780:21 (Before the first meeting, Mr. ██████ contacted a "very close, personal relation" of his who worked at Korea's embassy. Prior to the second meeting, Mr. ██████ close personal relation told him that the FSC's Chairman would be in Turkey and travelling to London on or about 25 November 2011 and therefore available to meet with the Hana Chairman. Mr. ██████ testified at the hearing that did not know why this information was told to him.).

⁸⁹⁴ Exhibit CWE-023, ██████ Second Witness Statement, para. 30.

⁸⁹⁵ Exhibit C-268, Lone Star-█████ Meeting Transcript, pp. 3, 16.

⁸⁹⁶ Exhibit C-268, Lone Star-█████ Meeting Transcript, p. 16:

█████ [...] *[W]hat they're doing is illegal. And they don't mind if you [Hana] know they're [...] conducting illegal activity. They don't want us [Lone Star] to know.*

█████ *That is, that is why there is no proof that they are asking [for a] price reduction.*

█████ [...] *That is why. They are ver- very careful. They really do not want to be, uh, so that's the difficulty we have.*

█████ *So, so you think they know they're breaking the law. But [...] because of that they're careful not to leave evidence.*

█████ *That, that may be true. That's my own speculation. [emphasis added]*

t. **14 November 2011 – Hana’s Report to the FSC**

640. Mr. [REDACTED] of Hana reported to the FSC that “Lone Star has been notified that, in view of the political climate in Korea [...] there is a need to change some of the terms [...] **including the proposal to reduce the existing purchase price**” as well as to “execute a new amendment to the SPA after the FSC’s issuance of a sale order”⁸⁹⁷ [emphasis added].
641. Mr. J.H. Sohn of the FSC, who received the status update letter on behalf of the FSC, testified that he was “flustered when [he] received Hana’s report, as [he] had not taken any actions regarding the sale price.”⁸⁹⁸ Moreover, Mr. Sohn testified that the “Claimants’ interpretation is improbable,” given that when companies respond to requests or instructions from the regulator, “they typically mention the request expressly (e.g., ‘in

⁸⁹⁷ Exhibit C-271, Hana’s Report on KEB SPA Status. Hana (through Mr. [REDACTED] reports to the FSC that:

- o *Thereafter, some political circles, civic organizations and news sources have argued that it is unfair to pay Lone Star, which has in fact lost the management right with respect to KEB, a management premium, with a purchase price (KRW 13,390) that is 70% to 80% higher than the market price of the KEB stocks. In order to prevent Lone Star from receiving large amounts of premium, they have gone as far as to suggest that a punitive sale order should be issued or to even heighten the level of punishment, depending on whether Lone Star is a non-financial business operator.*
- *HFC has explained to Lone Star in detail about the recent direction in public opinion in Korea, and further:*
 - o *Lone Star has been notified that, in view of the political climate in Korea, the changes to the legal status of Lone Star after the execution of the SPA Amendment and the recent changes to the environment of the financial markets, there is a need to change some of the terms and conditions of the SPA (including the proposal to reduce the existing purchase price), and HGF [Hana] is promoting discussions thereon. [emphasis added]*

⁸⁹⁸ J.H. Sohn First Witness Statement, para. 18 (referring to Exhibit C-271, Hana’s Report on KEB SPA Status):

Hana sent a status report to the FSC on November 14, 2011, a copy of which can be found at Exhibit C-271. When I received it, however, I was surprised to see that Hana had gone beyond the scope of what I had requested. I had asked Mr. [REDACTED] simply to inform us whether Hana intended to continue the SPA with Lone Star. Instead, the report contained what, in my view, was irrelevant and unnecessary information. Particularly, I thought it was improper that the report discussed certain groups’ views against Lone Star receiving 70-80% higher than the KEB stock price, the public demand for a so-called “punitive” sale order, or Hana’s efforts to negotiate a lower price. Such information was irrelevant to the FSC’s decision making process, and could be misconstrued (as I understand Lone Star has done in this arbitration) to suggest that the FSC had encouraged Hana to seek a reduction in the purchase price, when in fact the FSC had done no such thing. I was flustered when I received Hana’s report, as I had not taken any actions regarding the sale price, either in requesting the status report or at any other point. [emphasis added]

accordance with your request' or '... as requested by the FSC'). There is no such language here, which makes sense, since no request of the nature suggested by Claimants was made."⁸⁹⁹

642. An FSC internal document from November 2011 states:

- o *Hana Financial Group explained in detail to Lone Star about the recent movement of public opinion both home and abroad; and in addition,*
 - *Considering domestic political environment, Lone Star's changed legal status since the conclusion of the aforementioned SPA, and the changed environment of the recent financial market, it delivered its position (including the proposal of downward adjustment of the previous sale price[]) that part of the main contract conditions of the amended SPA requires modification and are in the process of negotiation.*⁹⁰⁰

643. The Claimants contend that it is very likely that the report Mr. [REDACTED] sent to the FSC included precisely the information that Mr. Sohn had already requested from Hana. In effect, Hana is reporting on the implementation of a strategy already agreed to by the FSC.⁹⁰¹ The Respondent says that no such inference is reasonable and that Hana is simply reporting about its own initiative.⁹⁰²

⁸⁹⁹ J.H. Sohn Second Witness Statement, para. 19.

⁹⁰⁰ Exhibit C-769, FSC, Q&A in Regard to Lone Star, p. 59 [emphasis added].

⁹⁰¹ Reply, para. 216.

⁹⁰² Mr. Sohn proposes in his report of 18 November 2011 to the FSC that it should request a new application based on the information received from Hana on 14 November 2011; see Exhibit R-119, FSC, (Summary) Processing of Hana Financial Group, Inc.'s Application for Approval of acquisition of KEB as Subsidiary, p. 6:

(Draft) Notice in Related to Hana Financial Group Inc.'s Application for Approval of Acquisition of Korea Exchange Bank Co., Ltd. as Subsidiary

Reference is made to your application of 13 December 2010 for approval of acquisition Korea Exchange Bank Co., Ltd. ("KEB") as subsidiary and the course of events related to the KEB share purchase agreement submitted to us on 14 November 2011.

Based on an overall review of the changes in conditions including your submissions of 14 November 2011 to us, it seems difficult for us to take actions on the existing application for approval of acquisition. In this respect, you are kindly requested to submit a new application that reflects such changes in conditions including your submissions of 14 November 2011 to us.

See also Exhibit C-810, Minutes of 18 November 2011 12th Non-Regular Meeting of FSC. It was recorded in the minutes of the FSC Commission meeting that:

u. 18 November 2011 – FSC Issues a Disposition Order

644. On 18 November 2011, the FSC issued a Disposition Order without a punitive condition,⁹⁰³ requiring Lone Star to dispose of its KEB shares in excess of 10% no later than 18 May 2012. The accompanying press release included the following explanation:

The objective of the regulatory regime with respect to the review of major shareholder eligibility and the issuance of share disposition order is to exclude ineligible parties from becoming major shareholders. Thus, if an ineligible person is stopped from being a major shareholder of a bank, notwithstanding the lack of specific method for compliance, the objective can be met.

It was questioned what the changes in related circumstances exactly mean.

(It was answered as follows: Lone Star lost large shareholder eligibility after it was found guilty of stock price manipulation, resulting in restriction on the voting rights regarding its shares held in excess of the limit (41.02%) among KEB shares held by Lone Star; and Hana Financial Group also sent the FSC the official document that renegotiations are underway with regard to the share purchase and sale agreement between Hana Financial Group and Lone Star.)

See further **Exhibit C-927**, Transcript of 18 November 2011 12th Extraordinary Meeting of FSC, p. 23. Mr. Sohn's briefing of his report of the FSC Commission as recorded in the stenographic minutes speaks of the need "for us to align our positions somewhat:"

Yes, you are right. HFG expressed its will to incorporate the subsidiary to us through the application to such effect in the past. Then, we express our opinion in response that it is difficult to proceed with the examination based on what we already have. In HFG's correspondence to us, it mentions that even HFG itself already is in discussion with Lone Star about the possibility of withdrawing the application and submitting a new one. This shows that there is a possibility of withdrawal. However, for the certainty of this effect on one hand, and the need for us to align our positions somewhat as to the existing application submitted last year, on the other, we want to make a decision that we cannot proceed with the procedure with the existing application. [emphasis added]

Mr. [REDACTED] who had received the initial call from Mr. Sohn at the FSC, testified that after meeting with Lone Star on November 11, 2011: "I drafted the report myself," responding to Mr. Sohn's telephone call ([REDACTED] First Witness Statement, para. 21). According to the testimony of Mr. Sohn, "Mr. [REDACTED] [was his] primary contact at Hana regarding Hana's application" (J.H. Sohn First Witness Statement, para. 17). Mr. Sohn had been working as the FSC team leader responsible for processing Hana's application for nine months, since February 2011 (J.H. Sohn First Witness Statement, para. 2). Considering Mr. Sohn's and Mr. [REDACTED] professional relationship, and the fact that Mr. [REDACTED] had both received the initial request per phone from Mr. Sohn and drafted the response, the risk that Mr. Sohn's message had been misunderstood is minimal. Therefore, it is very likely that the report Mr. [REDACTED] sent to the FSC includes precisely the information that Mr. Sohn had requested from Hana.

⁹⁰³ **Exhibit C-276**, Financial Services Commission, Notice of Measures Against Shareholder of Korea Exchange Bank, 18 November 2011:

The Financial Services Commission hereby issues an order pursuant to Article 16-4, Paragraph (5) of the Bank Act that LSF IV, as a shareholder of Korea Exchange Bank in excess of the prescribed limit, should dispose of the shares in excess of 10% of the total number of issued and outstanding voting shares of Korea Exchange Bank by no later than May 18, 2012.

[...]

Although the financial regulators may issue disposition order to Lone Star in case it does not voluntarily sell the stake, even in such case so-called "punitive disposition" is not appropriate since there is no clear statutory basis for such type of disposition under the Bank Act

[...]

However, if the FSC attaches a condition such as market sale to the mandatory sale order merely because it has failed to dispose of the shares voluntarily, there is high likelihood that it may result in infringement upon property rights without legal basis as well as breach of the equitable principles.⁹⁰⁴ [emphasis added]

v. **18 November 2011 – FSC Issues a Compliance Order and Requests Hana to Submit a New Application**

645. On 18 November 2011, the FSC requested from Hana a new *application*, not a new contract,⁹⁰⁵ but Mr. Sohn testified that it was reasonable for the FSC to assume an amended contract "given that Hana had already reported that it was in the process of renegotiating the SPA with Lone Star, which meant that the terms of the transaction (which form one of the basic components of an acquisition application) were under revision"⁹⁰⁶ and he therefore expected that a new contract would have to be made.
646. In the days following the FSC announcement, several members of the FSC made comments to the media that in the approval process "price will be a factor."⁹⁰⁷ On 18 November 2011, it was reported in the media:

⁹⁰⁴ **Exhibit C-274**, "Financial Services Commission Orders Lone Star Share Disposal Within Six Months," *FSC Press Release*, 18 November 2011, pp. 3-5, 13.

⁹⁰⁵ Counter-Memorial, para. 353; Reply, para. 219.

⁹⁰⁶ J.H. Sohn Second Witness Statement, para. 21.

⁹⁰⁷ Reply, para. 221. **Exhibit C-278 / R-511**, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011 (One FSC Commissioner stated that, "once a new application is submitted ... the financial soundness of HFG will be reviewed and the price will also be a factor"); **Exhibit C-277**, "FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price,'" *Hankook Ilbo*, 18 November 2011 (Reporting that the FSC's recommendation that Hana submit a new application "can be interpreted as a message to 'lower the purchase price'" and that a "high-ranking official of the FSC" stated that "the current agreement (KRW 4.4059 trillion) is too high" and the FSC would "wait and see, as Hana Financial Group said that they would lower the price"); **Exhibit C-811**, "Lone Star to lower KEB Price," *The Korea Times*, 21 November 2011 ("The FSC's ruling is widely interpreted as a call for both Hana and Lone Star to lower the aggregate sale price of about 4.41 trillion won.").

With respect to the approval on Hana Financial Group's agreement to purchase shares issued by KEB, the FSC announced that it would notify Hana to submit another application for approval on the inclusion of a new subsidiary. Simply put, the FSC wants Hana to submit a new application reflecting the circumstantial changes over time as the acquisition process has been delayed for more than one year, which is, in fact, a message to "lower the purchase price."⁹⁰⁸ [emphasis added]

647. An FSC official is quoted in the press the same day as the FSC requested a new application that the current acquisition price is too high:

A high-ranking official of the FSC said, "KEB's stock price has significantly dropped, which is why we think the purchase price agreed on the current agreement (KRW 4.4059 trillion) is too high," adding, "we will wait and see as Hana Financial Group said that they would lower the price."⁹⁰⁹ [emphasis added]

648. Other media outlets also reported FSC pressure to reduce the share price⁹¹⁰ and the FSC did not issue any corrective statement denying that the FSC was demanding a reduced purchase price.⁹¹¹ On 21 November 2011, *Yonhap Infomax* reported:

The FSC is pressuring HFG to reduce the purchase price by having HFG reapply for approval to acquire KEB as a subsidiary, the original application of which was previously submitted.⁹¹²

649. The article continues:

⁹⁰⁸ Exhibit C-277, "FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price,'" *Hankook Ilbo*, 18 November 2011.

⁹⁰⁹ Exhibit C-277, "FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price,'" *Hankook Ilbo*, 18 November 2011.

⁹¹⁰ See above note 907.

⁹¹¹ Notably, the FSC had issued a corrective statement with regard to an earlier news report; see S.D. Kim Second Witness Statement, para. 13:

*Immediately after the article [Exhibit C-777, "Hana Financial Group Likely to Buy Korea Exchange Bank," *Dong-A-Ilbo*, 29 September 2011] was published, the FSC issued an explanatory statement clarifying the FSC's position and requesting that the press, in reporting on this issue, be cautious not to repeat the inaccuracies in the article. The FSC's explanatory statement stated: "There is nothing that has been determined with respect to the above article. Because this will rather be handled after legal review following the court's decision in the future, please be of caution in reporting." I understand that the explanatory statement has been submitted as Exhibit R-278.*

⁹¹² Exhibit C-278 / R-511, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011. The Respondent has contested the Claimants' translation of Exhibit C-278 and has submitted its own translation of the document as Exhibit R-511.

*The FSC essentially alluded that they would not approve the acquisition of subsidiary if there was the risk that acquiring KEB would harm HFG's financial soundness. As such, in actuality, it is interpreted that the FSC is requiring HGF and Lone Star to reduce the purchase price for KEB.*⁹¹³ [emphasis added]

650. It was reported that the approval of Hana was contingent on a price reduction:

Commissioner Lee added that "once a new application is submitted, we will review based on such document," and further adding that "the financial soundness of HFG will be reviewed and the price will also be a factor."

*A member of the bank circles interpret [sic] that "the FSC is indirectly using the soundness of HGF's financials as a way to place pressure on HFG and Lone Star to lower the purchase price for KEB" and that "feeling burdens from the 'eat and run' controversy arising from issuing a simple sale order, the FSC is creating safety mechanisms to keep the situation in check."*⁹¹⁴ [emphasis added]

w. **25 and 26 November 2011 – Meetings in London**

651. On 25 November 2011, a week after the Disposition Order, Lone Star and Hana met in London. Lone Star agreed to lower the sale price to 11,900 KRW per share if Hana could obtain assurances that the Korean Government would finally approve the sale of KEB at that price.⁹¹⁵

652. Hana Chairman [REDACTED] testified that he "did not tell Lone Star during the [November 25] negotiation that the FSC was conditioning its approval on a price reduction, because the FSC had never said anything like that,"⁹¹⁶ but Lone Star surreptitiously recorded the meeting and his actual words are in evidence. Hana Chairman [REDACTED] is recorded saying:

Well, if we decide the price, I'll give you assurance within one or two days.

MR. [REDACTED] So you have, have you discussed this price reduction with the FSC?

⁹¹³ Exhibit C-278 / R-511, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011.

⁹¹⁴ Exhibit C-278 / R-511, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011.

⁹¹⁵ Exhibit C-228, Transcript of November 2011 Meeting, pp. 3-7, 13-14, 54-55.

⁹¹⁶ [REDACTED] First Witness Statement, para. 23.

CHAIRMAN [redacted] *Not really, but uh, I do have a feeling. I do have many dialogues with FSC. But I have a feeling. I told them 1 trillion won reduction. I told them, "He's kidding. No way." I talked to, you know, FSC people. One trillion reduction, no way.*⁹¹⁷ [emphasis added]

653. The meeting developed in three phases:

- (a) Hana Chairman [redacted] delivered the message that both parties in the National Assembly (without reference to the FSC) were demanding a price reduction;⁹¹⁸
- (b) Hana Chairman [redacted] confirmed his understanding that the FSC had no power to impose punitive conditions such as a reduction in the share price⁹¹⁹ but that at least some members of the National Assembly were demanding it;

⁹¹⁷ Exhibit C-228, Transcript of November 2011 Meeting, p. 6.

⁹¹⁸ Exhibit C-228, Lone Star Meeting with Hana, November 2011, pp. 3-4:

CHAIRMAN [redacted] [...] [M]ost [...] politicians think about this [a]s [a] forced sell-buy. [...] So that's why our agreement should be changed; not by FSS or Blue House. Because [it is] right by [the] ruling party, you know, some of the ruling party and National Assembly. And they obliged to Blue House and also to FSS, and...

[...]

They told me, we should reduce at least 20% of the, you know, our contracted price, which is under 11,000 won per shares. [...]

[...]

I met many congressmen [...]

[...]

You know, ruling party leader, Mr. Hong, you know, he's my college junior. And opposition leader, Mr. Han is my high school junior. I know every- everybody, you know. I've known them more than 10 years, 20 years. [...] [S]ome of them tell me, "Well, we should reduce by minimum of 1 trillion[?]" [...] They told me the price should be under 11,000 won per share. [...] I can tell them 11,000 won per share. So I tried to push it and say 11,900 is it.

Thus, Hana Chairman [redacted] stated that the leadership of the National Assembly demanded a price of 11,000 won per share and that his suggested compromise of 11,900 per share (i.e., about a KRW 500 billion reduction) would be "push[ing] it" for the National Assembly.

⁹¹⁹ Exhibit C-228, Transcript of November 2011 Meeting, p. 4:

MR. [redacted] [...] *Let me just see if I can understand that [...] [T]here's nothing [...] in the law or in precedent which would impose punitive measures [on the sale order of 18 November].*

CHAIRMAN [redacted] *No.*

MR. [redacted] *Nothing.*

CHAIRMAN [redacted] *Nothing.*

- (c) Hana Chairman █████ stated that he would consult with the FSC Chair and, if there was a positive response, "I will give you assurance [of approval] within one or two days."⁹²⁰ He stated that he "thought" he could get assurance of FSC approval if the share price was reduced to KRW 11,900.⁹²¹

MR. █████ *Despite that, the people in the [National] Assembly have come to you[] and say that [...] in order to satisfy public sentiment, the price has to be reduced. That's what they said?*

CHAIRMAN █████ *Uh-huh.*

⁹²⁰ Exhibit C-228, Transcript of November 2011 Meeting, pp. 6-7:

CHAIRMAN █████ *Well, if we decide the price, I'll give you assurance within one or two days.*

[...]

I do have many dialogues with FSC. But I have a feeling, I told them 1 trillion won reduction. I told them, "He's kidding. No way." I talked to, you know, FSC people. One trillion reduction, no way.

[...]

[T]hey told me, I should, you know, recognize [...] [the] two [political] parties', you know, reaction on this deal.

[...]

That's why [with the] two parties, you know, all these Chairman of the FSS should step down.

MR. █████ *And both of those parties want the price reduced today? So the FSC has basically told you that they need the, they need the price reduced as well?*

CHAIRMAN █████ *That's right. [emphasis added]*

⁹²¹ Exhibit C-228, Transcript of November 2011 Meeting, pp. 13-14:

MR. █████ *But at 11,900, is it your judgment that the FSC is going to do this? At 11,900?*

CHAIRMAN █████ *I try. But I can do it.*

MR. █████ *You think you can do it.*

CHAIRMAN █████ *Yeah.*

MR. █████ *And you will know when?*

CHAIRMAN █████ *By tomorrow or by early Monday. I'll be back tomorrow. Fortunately, I can meet, you know FSC Chairman at the airport today. He's coming 4:30 in the afternoon from Turkey, and... I suppose to meet him tomorrow.*

MR. █████ *Alright, tomorrow.*

See also, Exhibit C-949, ICC Award, para. 201; the ICC commented:

It was only the negotiated price for the KEB Shares between Hana and Lone Star that changed between the two meetings so the fact that Chairman █████ was able to conclude from his conversation with the FSC Chairman on 25 November 2011 that the FSC would be able to approve Hana's Application must have been the result of the FSC Chairman's understanding that there had been a price reduction.

654. Hana Chairman ██████ described the meeting in the following manner in his First Witness Statement:

I told Mr. ██████ at the [November 25] meeting that Hana believed that a price reduction was necessary for the acquisition to proceed. I did not tell Lone Star during the negotiation that the FSC was conditioning its approval on a price reduction, because the FSC had never said anything like that.⁹²² [emphasis added]

This version of the meeting was endorsed by Mr. ██████⁹²³

655. The Claimants rely on Mr. ██████ description of the requested assurances:

Ultimately, we came to an agreement that the headline price would drop to KRW 11,900 per share (for which Hana Chairman ██████ thought he could obtain FSC Chairman Kim's informal support), which represented a reduction of approximately KRW 500 billion or 10% from the original contract price [...] [T]his deal would provide the significant cut in the headline price that the politicians, the public, and therefore the regulators, wanted to see. When we asked for assurances that the FSC would now approve the deal in light of the lower sale price, Hana Chairman ██████ told us that he would be speaking with FSC Chairman Kim the next day and would contact us immediately thereafter to inform us whether FSC Chairman Kim would support the renegotiated deal. Without such assurances that the FSC would support the renegotiated deal, we would not have agreed to move forward with the reduced sale price.⁹²⁴ [emphasis added]

656. Although the Hana Chairman told Lone Star that he and the FSC Chairman had planned to meet face-to-face in London to discuss the results of the 25 November 2011 meeting with Lone Star, one of the Hana officials, Mr. ██████ wrote to Mr. ██████ that “[t]onight [the] two chairmen had a long conversation about our meeting result over the phone call, which made it unnecessary for them to meet each other at the airport;” however, he wrote,

⁹²² ██████ First Witness Statement, para. 23.

⁹²³ ██████ First Witness Statement, para. 26:

At this [25 November 2011] meeting, Lone Star again repeatedly asked us, “Did the FSC tell you that?” and “Did the FSC ask you to reduce the price?” Chairman ██████ repeatedly said “no,” each time explaining that the financial regulators had not said anything about reducing the price. Rather, as we explained to Lone Star, it was certain individual politicians (e.g., National Assemblymen) that had complained about the price of the SPA. We said it was only our “feeling” that reducing the price would make it easier for the FSC to approve Hana’s application.

⁹²⁴ Exhibit CWE-023, ██████ Second Witness Statement, para. 30.

Hana Chairman [REDACTED] wished to meet with a Lone Star representative the next day “in order to explain the responses from [the] FSC Chairman and discuss ... the subsequent issues.”⁹²⁵

657. The accounts of what was said by the FSC Chairman in that “long conversation” differ wildly. FSC Chairman Kim testified as follows:

[Hana Chairman] [REDACTED] *told me that Lone Star wanted the application to be approved swiftly, and then asked me whether I would be able to have dinner with him when I would be in London the following day. I replied firmly that the review process would proceed in accordance with law, that whether to approve the application rested on the commission’s decision, and that, accordingly, I could not comment on it. Then I declined to have dinner with [Hana Chairman] [REDACTED]*⁹²⁶ [emphasis added]

FSC Chairman Kim also testified that the outcome of the negotiations between Lone Star and Hana was not mentioned in the call “because [he] didn’t even know that they were in negotiations.”⁹²⁷ However, FSC Chairman Kim had been informed just one week before, during the 18 November 2011 FSC meeting that “renegotiations [were] underway.”⁹²⁸

658. When asked in the Hearing about his 25 November 2011 conversation with the FSC Chairman, Hana Chairman [REDACTED] gave the following account:

Q. Did you tell FSC Chairman Kim that you had any particular news to report to him on the progress of the negotiations with Lone Star?

*A. The negotiations are coming close to an end, but when do you think you can give us approval by?*⁹²⁹

659. Lone Star Chairman Mr. [REDACTED] on the other hand testified that he was given a very different version from the Hana Chairman. He “recall[s] very clearly [Hana] Chairman

⁹²⁵ Exhibit C-485, Emails Between [REDACTED] and [REDACTED] 26 November 2011. Because Mr. [REDACTED] was unavailable the next day, Hana Chairman [REDACTED] met with Mr. [REDACTED].

⁹²⁶ S.D. Kim First Witness Statement, para. 22.

⁹²⁷ TD7, 1922:12-13.

⁹²⁸ See Exhibit R-119, FSC, (Summary) Processing of Hana Financial Group, Inc.’s Application for Approval of acquisition of KEB as Subsidiary, p. 2 (“HFG sent a letter[] to the FSC informing an ongoing re-negotiation with Lone Star of the share purchase agreement (14 November 2011) ... including a reduced purchase price”); Exhibit C-810, Minutes of 18 November 2011 12th Non-Regular Meeting of FSC, p. 9 (“[i]t was questioned what the changes in related circumstances exactly mean. (It was answered as follows: ... Hana Financial Group also sent the FSC the official document that renegotiations are underway with regard to the share purchase and sale agreement between Hana Financial Group and Lone Star.)).

⁹²⁹ TD 7, 1726:2-6.

██████████ telling me that the FSC Chairman had confirmed that the price cut was essential to getting the transaction approved, and had agreed that he would support FSC approval of Hana's application on the new terms."⁹³⁰ Indeed, "[i]t was only on the basis of that FSC assurance that the deal would finally go through that we agreed to proceed with the price reduction."⁹³¹

x. ***3 December 2011 – The Parties Sign an Amended Share Purchase Agreement Including the Price Reduction***

660. On 3 December 2011, the parties signed the amended SPA that reduced the sale price from KRW 13,390 per share to KRW 11,900 per share, thereby reducing the total sale price to approximately KRW 3.9 trillion.⁹³² On the face of the SPA, this was an approximately USD 433 million cumulative reduction in projected proceeds from the sale.⁹³³

661. The Claimants note that the politicians credited the FSC with the price reduction. At a 26 December 2011 hearing, "the National Assembly effectively congratulated FSC Chairman Kim for succeeding in reducing the sale price."⁹³⁴ Assemblyman Yong-Tae Kim noted that "the press finds that the purchase was made at a reasonable price despite the previous worries that Lone Star would have taken massive amount [*sic*] of money."⁹³⁵ Therefore, according to Assemblyman Yong-Tae Kim, "I do not know what would be the benefits, as we drag on," and "we need to take prompt measures if you agree with the judgment that ... **KEB is sold out at a reasonable price.**"⁹³⁶ To the contrary, the

⁹³⁰ Exhibit CWE-019, Second Witness Statement of ██████████ 22 September 2014 ("██████████ Second Witness Statement"), para. 36.

⁹³¹ Exhibit CWE-019, ██████████ Second Witness Statement, para. 36.

⁹³² Exhibit C-280, Amended and Restated SPA Between Lone Star and Hana; Exhibit C-423, LSF-KEB Holdings SCA, Report on Transfer of Securities in the OTC Market, 10 February 2012.

⁹³³ Reply, para. 233; Exhibit CWE-007, ██████████ First Witness Statement, para. 73.

⁹³⁴ Reply, para. 234.

⁹³⁵ Exhibit C-836, Minutes of the National Assembly Hearing of the National Policy Committee, 26 December 2011, p. 19.

⁹³⁶ Exhibit C-836, Minutes of the National Assembly Hearing of the National Policy Committee, 26 December 2011, p. 19 [emphasis added].

Respondent states, the FSC and its Chairman “continued to face strong public and political opposition and criticism, especially for not having imposed a stock market sale order.”⁹³⁷

IX. PRINCIPLES OF LIABILITY

A. OVERVIEW

662. The Tribunal is thus focused on the Respondent’s allegedly “arbitrary or discriminatory” acts or omissions in “wrongfully” withholding regulatory approval of the sale of LSF-KEB’s equity stake in KEB, contrary to the 2011 BIT.⁹³⁸
663. Such measures are said to violate Article 2(3) of the BIT, which prohibits the Respondent from “in any way impair[ing] by arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory” by Belgian and Luxembourger investors.⁹³⁹ The Claimants also assert such measures violate the 2011 BIT obligations of (i) Fair and Equitable Treatment; (ii) Full and Continuous Protection and Security; (iii) Most-Favoured Nation and National Treatment to the Claimants and their investments; (iv) prohibitions on expropriation of the Claimants’ investments without prompt, adequate, and effective compensation; (v) failure to honour its written obligations to the Claimants in the Korea-Belgium Tax Treaty (Umbrella Clause); and (vi) prohibition of the free transfer of funds.⁹⁴⁰
664. The Claimants point out that unlike some other bilateral investment treaties, the BIT in this case has no carve-out for “matters of taxation,”⁹⁴¹ and therefore all of the BIT’s substantive protections apply with equal force in the taxation context as in any other, including Article 2’s prohibition against arbitrary or discriminatory measures. However, the

⁹³⁷ S.D. Kim Second Witness Statement, para. 29. See also **Exhibit R-394**, Letter from [REDACTED] 20 December 2011. (“Last month, the Korean Financial Services Commission, in its ruling to allow Lone Star to sell its shares of KEB, resisted pressure from labor groups, opposition politicians, and civil activists to impose penalties and other punitive conditions on the sale.”).

⁹³⁸ Memorial, para. 507.

⁹³⁹ **Exhibit C-001**, BIT, Art. 2(3).

⁹⁴⁰ Memorial, para. 506.

⁹⁴¹ See, e.g., **Exhibit CA-008**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 123; **Exhibit CA-257**, *Cargill v. Mexico*, para. 235; **Exhibit CA-255**, *RosInvestCo, UK Ltd. v. Russian Federation*, SCC Case No. 079/2005, Final Award, 12 September 2010, para. 44.

Tribunal has already indicated its reasons for rejecting the Claimants' arguments about "unjustified tax assessments."

665. The Tribunal will therefore proceed to examine liability for the alleged wrongful conduct of the FSC in relation to the sale of KEB shares to Hana.

B. TEST FOR FINDING INTERNATIONAL LIABILITY

666. Three distinct elements are to be taken into account:

- (a) the burden of proof, *i.e.*, on which party the obligation rests to prove its case;
- (b) the standard of proof required to discharge that burden; and
- (c) a causal link between the treaty violation if established and the loss for which compensation is claimed.

667. Although there is no explicit reference to the burden or standard of proof in the ICSID Convention or in the ICSID Arbitration Rules, Article 34 of the Arbitration Rules provides the Tribunal with the power to "be the judge of the admissibility of any evidence adduced and of its probative value." The Tribunal is therefore to weigh the evidence, and assess "how much evidence is needed to establish either an individual issue or the party's case as a whole."⁹⁴² The Claimants also argue there should be a shifting burden of proof, which the Respondent denies.⁹⁴³ As a general principle of law, the burden of proof rests with the party bringing forth a proposition (*onus probandi incumbit actori*).⁹⁴⁴

⁹⁴² Exhibit RA-019, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 ("*Rompetrol v. Romania*"), para. 178.

⁹⁴³ Reply, paras. 1236(iv), 1240; Rejoinder, paras. 986 *et seq.*, 1044.

⁹⁴⁴ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf>), para. 237 ("The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law" (citing *Military and Paramilitary Activities in and against Nicaragua*, ICJ Judgment, 26 November 1984 (available at: <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>), para. 101)); Exhibit CA-038, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 177 ("[V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for

(1) Burden of Proof

668. While the Claimants agree that they “bear the burden of demonstrating the truth of their claims,” and accept that the maxim *onus probandi incumbit actori* applies in this case,⁹⁴⁵ they argue that having, in their view, adduced enough evidence to substantiate their claims *prima facie*, the burden shifts to Korea to establish what the Claimants characterize as the Respondent’s “affirmative defense[s] [and] justifications[s].”⁹⁴⁶ These defences include: (i) the Respondent’s argument that the Tribunal must defer to the Respondent’s financial regulation and taxation measures, thereby effectively exempting those measures from the BIT; or, in any event, (ii) the Respondent’s argument that its actions are justified.⁹⁴⁷
669. There are occasions of course where a respondent affirmatively asserts a defence (such as a limitation period) which, as the party making the assertion, it must prove. However, a claim that a regulator is owed “deference” (to take the Claimants’ example) is simply a denial by the Respondent that an actionable wrong arises on the facts alleged by the Claimants.
670. What the Claimants are saying is that if at some point they establish what they consider to be a *prima facie* case, they are entitled to prevail unless their *prima facie* case is thrown into doubt by other evidence including evidence led by the Respondent. This does not mean the burden shifts from the Claimants having to prove their case to the Respondent being called on to disprove it. It simply means that at the end of the case, the Tribunal is to assess all the evidence before it, including “indirect evidence,” such as “inferences of fact and circumstantial evidence,” to determine whether the Claimants have established the

providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”)

⁹⁴⁵ Reply, para. 1214.

⁹⁴⁶ Reply, para. 1215 (“[W]hen Respondent asserts an affirmative defense or justification, it bears the burden of proving that defense. Specifically, to the extent that Respondent is asserting that (i) the Tribunal must defer to Respondent’s financial regulation and taxation measures, thereby effectively exempting those measures from the BIT or (ii) its actions are justified, Respondent must prove the existence and applicability of such defense or justification”); Reply, para. 1236(iv) (“only if Respondent provides a *prima facie* demonstration that its actions were reasonable under the circumstances does the burden of proof shift to Claimants to rebut Respondent’s asserted justification”); Reply, para. 1240 (“Because Claimants have adduced sufficient evidence to make out their *prima facie* case of arbitrariness ... Respondent has the burden to prove the reasonableness of its actions, which it cannot do.”).

⁹⁴⁷ Reply, para. 1215.

grounds necessary to justify an award in their favour. If the Respondent has not led rebuttal evidence, a tribunal may, in a proper case, allow the claim. As stated by the *Rompetrol v. Romania* tribunal, “[a] claimant before an international tribunal must establish the facts on which it bases its case or else it will lose the arbitration.”⁹⁴⁸

671. Nevertheless, evidentiary principles are applied in practice with a measure of flexibility. As stated by the tribunal in *Rompetrol*:

[I]n international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical.⁹⁴⁹

(2) Standard of Proof

672. The generally-required standard is proof on the “balance of probabilities” or “preponderance of the evidence.” The standard requires a showing that the factual allegation is “more likely than not true.” (Some tribunals have imposed a higher standard in relation to particularly serious allegations, *i.e.*, corruption, but no such exceptions arise in this case.)

673. This, perhaps, is when the Claimants conflate their “shifting burden” argument. While the legal burden rests on the party making the allegation, the evidentiary burden may shift back and forth in the sense that if the Claimants’ evidence is unanswered by the Respondent, the Claimants will prevail.

(3) Causation

674. The liability of a respondent State is dependent upon the establishment by a claimant of a causal link between the respondent and the harm of which a claimant complains. This principle is stated succinctly in the ILC Articles: “The responsible State is under an obligation to make full reparation for the injury **caused** by the internationally wrongful act”⁹⁵⁰ [emphasis added].

⁹⁴⁸ Exhibit RA-019, *Rompetrol v. Romania*, para. 179.

⁹⁴⁹ Exhibit RA-019, *Rompetrol v. Romania*, para. 181.

⁹⁵⁰ Exhibit CA-029 / RA-002, ILC Articles, Art. 31(1). See also Exhibit CA-320, *Jan de Nul v. Egypt*, para. 156 (“The ILC Articles were embodied in Resolution A/56/83 adopted by the General Assembly of the United Nations on

(4) Attribution of Responsibility to the State

675. The ILC Articles further define which organs, persons or entities engage the responsibility of the State:

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority [“à exercer des prérogatives de puissance publique”, in the French version] shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons

28 January 2002,” and as such, are considered to be “a statement of customary international law on ... the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties.”).

According to the *Jan de Nul* tribunal:

In order for an act to be attributed to a State, it must have a close link to the State. Such a link can result from the fact that the person performing the act is part of the State’s organic structure (Article 4 of the ILC Articles), or exercises governmental powers specific to the State in relation with this act, even if it is a separate entity (Article 5 of the ILC Articles), or if it acts under the direct control (on the instructions of, or under the direction or control) of the State, even if being a private party (Article 8 of the ILC Articles).

Exhibit CA-320, *Jan de Nul v. Egypt*, para. 157 [emphasis added].

*is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*⁹⁵¹

676. The FSC as a regulatory body entrusted with supervision of Korea's financial markets, and acting in that capacity, is in the opinion of one member of the Tribunal, an "organ of the State" within the scope of Article 4 and, in the view of a Tribunal majority, an entity empowered to exercise sovereign powers within the scope of Article 5. There is therefore no doubt that the acts or omissions of the FSC engage the responsibility of the Respondent.
677. For the sake of completeness, it should be noted in respect of the taxation claims that the Korean courts clearly constitute "organs of the State" and the Government tax authority, the NTS, is in the opinion of one member of the Tribunal an organ of the State, and in the view of a Tribunal majority, either an "organ of the State," or, at a minimum, exercises its governmental authority within the scope of Article 5.

X. DETERMINATION OF LIABILITY RELATING TO ISSUES OTHER THAN SHARE PRICE REDUCTION

678. In this section of the Award, the Tribunal will address multiple issues associated with the LSF-KEB investment in KEB.
679. The Tribunal is of the view that a number of the Claimants' allegations against the FSC can be dismissed without extended discussion on the basis that the evidence falls short of proof on a balance of probabilities.

(1) The Claimants Allege that the FSC Wrongfully Interfered in Hana's Aborted Interim Share Purchase Agreement

680. In May 2011, as discussed, Hana proposed an interim share purchase transaction of 10% of the KEB shares to demonstrate mutual commitment.⁹⁵² The next month, Hana decided not to proceed with the interim share purchase (although a loan, agreed to as part of the deal, was made). The Claimants state that Hana was pressured by the FSC/FSS to back out of the proposed "interim" purchase. The Respondent says that Hana simply concluded

⁹⁵¹ Exhibit CA-029 / RA-002, ILC Articles, Arts. 4-5, 8.

⁹⁵² Counter-Memorial, paras. 322-326.

that the interim share purchase was not in its corporate self-interest and that the plan was abandoned by Hana without any coercion or pressure by the regulators.⁹⁵³

681. According to the Claimants:

- (a) the FSS in late May 2011 warned Hana by phone and via a "Warning Notice" about risks to its capital ratio posed by the interim share purchase;⁹⁵⁴ and
- (b) the FSS questioned the adequacy of Lone Star's remaining KEB shares which no longer constituted a majority stake, as security for the proposed USD 1 billion loan to Lone Star.⁹⁵⁵

The Claimants contend that in June 2011, the FSS threatened to block Hana Bank's loan to Lone Star.⁹⁵⁶

682. The Respondent's position is that it was the regulator's "responsibility to 'supervise soundness' by assessing and responding to any possible negative impact that a proposed sale price might cause on a particular financial holding company."⁹⁵⁷ The FSS had concluded that the proposed interim share purchase *did* threaten to weaken Hana's soundness⁹⁵⁸ because it involved Hana purchasing a large non-control block of KEB shares at a price that was about 60% higher than the stock market price for KEB shares.⁹⁵⁹ The FSS calculated that the transaction loss would cause a 0.36 percentage point drop in Hana's consolidated capital adequacy ratio, which would fall to 12.02%, unless Hana were to dispose of billions of dollars of high-risk assets to offset the reduction in capital.⁹⁶⁰ At the time, the Respondent contends, Hana's capital adequacy ratio already was the lowest

⁹⁵³ [REDACTED] First Witness Statement, paras. 14-15; [REDACTED] First Witness Statement, para. 9; [REDACTED] First Witness Statement, para. 10; [REDACTED] Second Witness Statement, paras. 7-8.

⁹⁵⁴ Exhibit C-784 / R-327, FSC, Review Regarding the Acquisition of Part of Korea Exchange Bank Shares by Hana Financial Group, etc., 26 May 2011; [REDACTED] First Witness Statement, para. 15.

⁹⁵⁵ Witness Statement of Jae-Yong Lee, 16 January 2015 ("J.Y. Lee Witness Statement"), paras. 7-9.

⁹⁵⁶ Reply, para. 179.

⁹⁵⁷ Witness Statement of Donghyon Kim, 16 January 2015 ("D.H. Kim Witness Statement"), para. 9.

⁹⁵⁸ D.H. Kim Witness Statement, paras. 8-10, 16-17.

⁹⁵⁹ D.H. Kim Witness Statement, para. 9.

⁹⁶⁰ D.H. Kim Witness Statement, para. 10; Exhibit R-327, Review on the Partial Acquisition of KEB Shares by Hana Financial Group, etc., 26 May 2011 (competing translation of Exhibit C-784).

among all financial holding companies in Korea.⁹⁶¹ According to the Respondent, conveying concerns such as these to a regulated financial institution is well within the regulators' lawful supervisory mandate.⁹⁶²

The Tribunal's Ruling on the Aborted Interim Share Purchase Agreement

683. With regard to the interim share purchase, Hana was to pay a control premium for a 10% block of shares that did not carry control. Two Hana executives testified to their own worry about whether the interim share purchase could expose the directors and officers of Hana Financial Group and Hana Bank to claims by shareholders of an improvident transaction in breach of fiduciary duty.⁹⁶³ The Claimants have not established any wrongful conduct on the part of the FSC in relation to the proposed transaction.

(2) The Claimants Allege that the FSC Wrongfully Pressured Hana to Oppose Payment of KEB Dividends Contrary to Lone Star's Financial Interest

684. The Claimants argue that the financial regulators were responsible for KEB's decision not to pay a 2011 year-end dividend and to deny Lone Star's request for a further dividend in February 2012 "for political reasons, despite its lack of authority to block the dividends."⁹⁶⁴

685. In the Claimants' view, the dividends were appropriate given KEB's financial strength and unobjectionable from a regulator's point of view because the dividend payments would have had no material impact on KEB's financial viability.⁹⁶⁵

686. The Respondent states that the FSC became involved in its supervisory role,⁹⁶⁶ recognising that "the natural incentive of bank owners to take distributions of profit from the bank can

⁹⁶¹ Rejoinder, para. 698; D.H. Kim Witness Statement, paras. 10, 17.

⁹⁶² D.H. Kim Witness Statement, paras. 15-18; J.Y. Lee Witness Statement, paras. 18-19.

⁹⁶³ [REDACTED] First Witness Statement, paras. 14-15; [REDACTED] First Witness Statement, para. 10; [REDACTED] Second Witness Statement, paras. 7-8.

⁹⁶⁴ Reply, para. 246.

⁹⁶⁵ Reply, para. 237.

⁹⁶⁶ Rejoinder, para. 705; Witness Statement of Saechun Park, 16 January 2015 ("S.C. Park Witness Statement"), para. 9. See also Exhibit R-534, *Banking Act* (Law No. 11,051, partially amended 16 September 2011), Art. 34(4) (stating, in an article inserted into the Banking Act on 17 May 2010, that "[w]here the Financial Services Commission deems that a bank is likely to greatly undermine soundness in its management on the ground of its failure to satisfy a management instruction standard referred to in paragraph (2), it may request the bank to take necessary measures for the improvement of management, such as an increase of capital, restriction on dividend, etc.")

leave the bank over-exposed to future risk and thus 'come into conflict with the regulators' goal of ensuring the soundness and stability of the banking system."⁹⁶⁷

687. There are two separate dividends in issue, namely the 2011 mid-year dividend, when LSF-KEB was still the controlling shareholder, and the 2011 year-end dividend, which came to be considered in 2012 when LSF-KEB was no longer a shareholder.

a. The Mid-Year Dividend (2011)

688. The Respondent asks the Tribunal to discount the evidence of Mr. [REDACTED] a former Lone Star-appointed CEO of KEB, who states that the regulators wrongfully pressured KEB in 2011 to curtail its dividend payments,⁹⁶⁸ because his testimony is contradicted by his own contemporaneous report in which he wrote as follows:

I'd like to take the time to tell you what Deputy Governor Shin of the FSS and I talked about in our meeting [...]. He said that the distribution of dividends is the sole authority of the bank, and on the premise that it was not an issue that the supervisory authorities can intervene in, he expressed his concern over the high amount of quarterly dividends for the following reasons.⁹⁶⁹ [emphasis added]

689. The Lone Star appointed directors who controlled the KEB Board proceeded to approve the mid-year dividend on 1 July 2011 despite opposition from the non-Lone Star appointed directors.⁹⁷⁰

690. The Claimants state that in July 2011 an unidentified FSS official contacted Mr. [REDACTED] of Hana and said Hana should negotiate a reduction in the KEB share purchase price to offset the amount of the KEB mid-year dividend.⁹⁷¹ However, Mr. [REDACTED] has testified

⁹⁶⁷ Rejoinder, para. 706, citing S.C. Park Witness Statement, para. 13. See also S.C. Park Witness Statement, paras. 6-8 (describing this tension).

⁹⁶⁸ See Reply, paras. 237-246; [REDACTED] Second Witness Statement paras. 10-13.

⁹⁶⁹ Exhibit R-393, Minutes of 1 July 2011 6th Meeting of KEB Board of Directors, p. 4.

⁹⁷⁰ Rejoinder, para. 709; Exhibit R-393, Minutes of 1 July 2011 6th Meeting of KEB Board of Directors. After vocal opposition by several non-Lone Star appointed directors, the measure passed with votes of the five Lone Star-appointed directors, Messrs. [REDACTED] (the Chairman), [REDACTED], [REDACTED] and [REDACTED] voting in favour.

⁹⁷¹ Reply, para. 241, citing Exhibit C-483, Email from [REDACTED] to [REDACTED] 1 July 2011.

that he has no record and no recollection of any such communication with the FSS, which, he says, is something he would have remembered had it in fact happened.⁹⁷²

The Tribunal's Ruling on the Mid-Year Dividend

691. In fact, the mid-year dividend of USD 400.2 million was paid on 20 July 2011 and, in the Tribunal's view, Lone Star has no legitimate complaint in that regard.⁹⁷³

b. The Year-End Dividend (2011)

692. The Claimants contend that Hana and Lone Star had an unwritten agreement to pay a year-end 2011 [KEB] dividend, but Hana backed out at the last moment under pressure from the regulators.⁹⁷⁴ Mr. D.H. Kim of the FSS testified that he had contacted Hana and requested an explanation of media reports regarding a possible year-end dividend.⁹⁷⁵ The Claimants' position is that Lone Star was entitled to a year-end dividend because Lone Star was the owner of the shares on the record date. Although Lone Star had sought in their negotiations to have Hana guarantee Lone Star's entitlement to a certain level of dividends, Hana says it refused to provide any such guarantee.⁹⁷⁶ Hana's [REDACTED] pointed out that the payment of any dividend to former shareholders who were no longer shareholders after Hana's acquisition would not be in Hana's economic interest.⁹⁷⁷

693. While Mr. [REDACTED] testified that Hana told Lone Star that it was acting under pressure from the regulators,⁹⁷⁸ three Hana executives and two FSC and FSS witnesses all testified that the regulators did not pressure Hana to oppose Lone Star's year-end dividend request.⁹⁷⁹

⁹⁷² [REDACTED] Second Witness Statement, paras. 11-12.

⁹⁷³ See Exhibit CWE-034, [REDACTED] Second Expert Report, p. 15.

⁹⁷⁴ Reply, paras. 252-257.

⁹⁷⁵ TD6, 1535:16-1539:21.

⁹⁷⁶ [REDACTED] Second Witness Statement, paras. 21-23; [REDACTED] Second Witness Statement, para. 18.

⁹⁷⁷ [REDACTED] Second Witness Statement, para. 18.

⁹⁷⁸ Reply, paras. 251, 257.

⁹⁷⁹ S.D. Kim Second Witness Statement, para. 30; D.H. Kim Witness Statement, para. 20.

The Tribunal's Ruling on the Year-End Dividend

694. The evidence does not establish an “unwritten agreement” to pay a year-end dividend and no satisfactory reason is offered why Hana would willingly cause KEB to pay dividends from funds that would otherwise belong to KEB/Hana rather than to Lone Star. In any event, Lone Star has not established on a balance of probabilities that the regulators interfered in the year-end dividend process.

(3) The Claimants Allege that there was no Legitimate Purpose in the FSC Revisiting LSF-KEB's NFBO Status in 2011–2012

695. The FSC had determined in 2003 that LSF-KEB was not disqualified as a Non-Financial Business Operator (“NFBO”). Being labelled an NFBO under Article 2(1)9 of the *Banking Act* and Article 1(5) of the *Enforcement Decree* of the same Act limits an entity's ability to control a bank.⁹⁸⁰ The purpose of this legislation was to prevent domestic industrial capital, specifically *chaebols* (Korea's industrial conglomerates),⁹⁸¹ from controlling a

⁹⁸⁰ Exhibit C-235, Qualification Review Result for Shareholding in Excess of Prescribed Limit of Korea Exchange Bank, 16 March 2011, p. 3.

⁹⁸¹ Exhibit C-836, Minutes of 26 December 2011 National Policy Committee Meeting, p. 21:

FSS Chairman Hyouk-Se Kwon: As the system of non-financial business operator itself was introduced to regulate domestic chaebols, there are cases where it is difficult in reality to apply the system to foreign financial institutions or investment funds. So I think we need to make some complements to address such cases.

Exhibit C-235, Qualification Review Result for Shareholding in Excess of Prescribed Limit of Korea Exchange Bank, 16 March 2011, p. 4:

(Purpose of the non-financial business operator system) The non-financial business operator system was basically introduced to prevent a domestic industrial capital from controlling a financial business. It is necessary to take into account the purpose of the introduction of the system and other legislative cases when applying the non-financial business operator system to foreign private equity funds.

Exhibit R-112, Financial Services Commission Report on the Result of the Eligibility Assessment on the Shareholder Holding Shares in Excess of Limit in KEB, 27 January 2012, p. 2:

The scope of the specially related person was limited to a certain extent because it was practically impossible for the supervisory authorities to check every single overseas affiliates of a foreign corporation, and it was necessary to uphold the objective of the non-financial business operator system, which was introduced to prevent domestic industrial capital from controlling the banks. Since the introduction of the non-financial business operator system, the scope of the specially related person was uniformly limited in the respective eligibility assessments on Citi Group's acquisition of Hanmi Bank (in March 2004) and Standard Chartered's acquisition of Korea First Bank (in April 2005).

bank and using it as a private safe.⁹⁸²

696. The Claimants state that the FSC decision to revisit the NFBO issue in 2011 was simple harassment⁹⁸³ inspired in large part by the BIA and questions in the National Assembly.
697. The Respondent states that revisiting that issue was part of the FSC's "ongoing monitoring" function⁹⁸⁴ and had no impact on the approval process. The FSC *did* approve Hana's application, despite the fact that questions remained unanswered regarding Lone Star's NFBO status.⁹⁸⁵
698. It will be recalled that on 16 March 2011, the FSC concluded that for the purposes of the *Banking Act*, Lone Star was not an NFBO.⁹⁸⁶

⁹⁸² **Exhibit C-782**, Financial Supervisory Service, Report on the Progress of Determination of Lone Star's Status as a Non-Financial Business Operator, 26 December 2011 p. 10 ("The NFBO system was originally intended to prevent industrial capital from controlling banks and using them as a private safe.").

⁹⁸³ Reply, paras. 77-86.

⁹⁸⁴ Y.J. Kim First Expert Report, paras. 41, 111; H.S. Lee First Witness Statement, para. 21.

⁹⁸⁵ H.S. Lee First Witness Statement, para. 52; H.S. Lee Second Witness Statement, para. 36; Dai-Gou Sung Second Witness Statement, 19 January 2015, ("**D.G. Sung Second Witness Statement**") para. 25; **Exhibit R-113**, Minutes of 27 January 2012 FSC Meeting.

⁹⁸⁶ **Exhibit C-235**, Qualification Review Result for Shareholding in Excess of Prescribed Limit of Korea Exchange Bank, 16 March 2011, p. 4:

The Financial Services Commission has concluded, based on the materials and evidence identified and reviewed so far, that Lone Star Fund IV is not a non-financial business operator under the Banking Act.

In addition, considering the limit of the application of the Banking Act, purpose of the introduction of the non-financial business operator system, fairness with other foreign shareholders, and a sale to sell shares is a disadvantageous administration disposition seriously infringing upon the property rights,

the Financial Services Commission concluded that it could be an unreasonable application of the Banking Act to deem Lone Star Fund IV as a non-financial business operator.

See also **Exhibit C-928**, Stenographic Records of the 5th Financial Services Commission Meeting (disclosed per Special Referee), 16 March 2011, p. 9:

[Chairman] [...] And you don't seem to have differing opinions on the report that the administrative measure that will significantly infringe on Lone Star's property rights, which is its constitutional right, such as a share sale order, by deeming Lone Star IV as an NFBO can be an excessive application of the Banking Act, considering the fundamental limitations in applying the Banking Act and the intent of the NFBO system and so forth. Especially, some pointed out that the current NFBO system needs partial supplementation. So, I hope that the FSC's competent department

699. However, a month later, on 15 April 2011, Assemblyman Young-Ho Lim called for an investigation of the NFBO issue on the basis that Lone Star owned about 130 golf courses in Japan and that the value of these golf courses could inform the NFBO analysis.⁹⁸⁷ Notwithstanding its earlier affirmation that the NFBO requirement is aimed at domestic industrial investors, the FSC obligingly agreed to redo the analysis.
700. It is unclear why the FSC/FSS continued to examine the NFBO issue even after issuing a Disposition Order.
701. On 27 January 2012, the FSC announced its findings.⁹⁸⁸ It came to the same conclusion that it had previously come to on 16 March 2011: Lone Star was not disqualified as an NFBO.⁹⁸⁹

The Tribunal's Ruling on the Reopening of the Question of the Status of LSF-KEB as an NFBO

702. In the view of the Tribunal majority, the alacrity with which the FSC revisited the NFBO decision notwithstanding its very recent analysis of the same question, shows the lengths to which the FSC and FSS were willing to go to appease politicians and the press. It is some corroboration of the politicisation of the FSC that is blamed by the Claimants for the

responsible for the banking sector will review more thoroughly as to how to improve the system.

⁹⁸⁷ **Exhibit C-780**, Financial Services Commission, Regarding the Parliamentary Investigation of Lone Star, 19 April 2011. The reason for the continued NFBO investigation was that "Since last May, however, it has been alleged by the press and some in the political circle and so forth that Lone Star corresponds to an NFBO due to the existence of PGM Holdings, a golf course management firm in Japan."

⁹⁸⁸ **Exhibit C-779**, "Result of qualification review on the shareholder in excess of prescribed limit of KEB," FSC Press Release, 27 January 2012. On 5 December 2011, Lone Star sold the company that owned the Japanese golf courses, PGM Holdings. The sale did not interfere with the FSC/FSS continuing their analysis. As the investigation came to a close, an interim report shows that Assemblyman Lim's 15 April 2011 request and the KBS News report of 26 May 2011 were prime motivators for the regulators, as both are listed as Major Events. That same FSS interim report refers to various press allegations throughout the document. Similarly, the FSC's concerns about "the opposition party's argument" appeared in the FSS's analysis of 26 December 2011. See **Exhibit C-782**, Financial Supervisory Service, Report on the Progress of Determination of Lone Star's Status as a Non-Financial Business Operator, 26 December 2011, pp. 4-5.

⁹⁸⁹ **Exhibit C-779**, "Result of qualification review on the shareholder in excess of prescribed limit of KEB," FSC Press Release, 27 January 2012, p. 5; **Exhibit R-112**, Financial Services Commission Report on the Result of the Eligibility Assessment on the Shareholder Holding Shares in Excess of Limit in KEB, 27 January 2012, p. 12.

price squeeze on the sale of KEB shares. However, the revisitation of the NFBO issue itself came to nothing and did not in itself constitute a violation of the 2011 BIT.

XI. LONE STAR'S POSITION WAS COMPROMISED BY ITS CONVICTION FOR STOCK PRICE MANIPULATION

703. A major theme of the Claimants' submissions is that they were the victim of public and political hostility to "Eat and Run" foreign investors who swooped in for a quick profit then took their monies (usually portrayed as excessive monies) and "ran" home.

704. In addition to the usual attributes of an "Eat and Run" investor, however, Lone Star had been convicted of a serious financial crime. Thus, to extend the "Eat and Run" metaphor, Lone Star might also be called a "Cheat and Run" investor.

705. More broadly, there is no doubt that the timing of Lone Star's attempted exit from Korea was unfortunate.

706. The Tribunal has already described in some detail the opposition from unions, a significant number of politicians in the National Assembly and elements of the public.⁹⁹⁰ Various civic organisations, scholars and media outlets urged punitive action against Lone Star.⁹⁹¹ The Claimants say the Korean regulators were concerned, *above all*, with the negative public sentiment regarding Lone Star's so-called "excessive profits."⁹⁹²

⁹⁹⁰ Namely, (1) *The Wall Street Journal* reporter Mr. [REDACTED] (whose "understanding of the Lone Star/KEB situation was often first shaped by reports in the South Korean media," and was complemented only by "what was publicly revealed by the relevant parties" (Exhibit CWE-022, Second Witness Statement of [REDACTED] 24 September 2014 ("[REDACTED] Second Witness Statement"), para. 2)); (2) former Vice President of the Seoul branch of the American Chamber of Commerce Ms. [REDACTED] (who testifies to vague hearsay of unidentified Korean Government officials (Exhibit CWE-021, Second Witness Statement of [REDACTED] 16 September 2014 ("[REDACTED] Second Witness Statement"), para. 7)); (3) former United States Senator [REDACTED] (whose testimony is based on a "lunch with President Lee Myung-bak," supposedly "extensive relationships" with unnamed "Korean officials," and his "own nearly 25 years of experience as a politician and elected official" in the United States (Exhibit CWE-018, Second Witness Statement of [REDACTED] 3 September 2014 ("[REDACTED] Second Witness Statement"), para. 2)); and (4) Dr. [REDACTED] a former Korean statesman who was not in public office during the events of this case, but who professes to have "closely followed what can best be described as 'the Lone Star saga,' which was front-page news for about a decade" (Exhibit CWE-031, Expert Report of [REDACTED] 25 September 2014 ("[REDACTED] Expert Report"), para. 9).

⁹⁹¹ Counter-Memorial, paras. 38, 263, 340, 831, 836-837, 911; see also H.S. Lee Second Witness Statement, para. 19; D.G. Sung Second Witness Statement, para. 21.

⁹⁹² Reply, para. 68.

707. The Respondent replies that the Claimants' "evidence" only establishes that the regulators never *succumbed* to those calls for punitive action.⁹⁹³

The Tribunal's Ruling on Relevance of the "Cheat and Run" Conviction

708. Ultimately, as will be seen, the allegations of "Cheat and Run" proved more damaging to Lone Star than the more generic public denunciation of "Eat and Run." It was the criminal conviction of 6 October 2011 which cost LSF-KEB its eligibility to continue to hold a controlling interest in KEB beyond 18 May 2012, and gave the FSC the leverage to orchestrate a price reduction.

709. The Tribunal does not accept the Claimants' attempt to pass off LSF-KEB's criminal liability as merely "vicarious" for the acts of certain rogue individuals employed by KEB. In fact, vicarious liability was not even an issue at that trial because, as mentioned, prosecutors amended the indictment against LSF-KEB and KEB Bank before trial to remove the vicarious liability/joint penal provision charges.⁹⁹⁴ The Court judgment spelled out the direct involvement of KEB directors appointed by Lone Star (*i.e.*, the "**directing minds**" of the corporation) as follows:

*Based on such facts, there is ample evidence that [redacted] [sic] was involved in the deceptive and manipulative conduct. Therefore, the arguments made by Defendant LSF-KEB in this regard are groundless.*⁹⁹⁵ [emphasis added]

⁹⁹³ Rejoinder, para. 730, citing, *inter alia*, Exhibit R-394, Letter from [redacted] 20 December 2011. According to the Respondent, the FSC: (1) opposed a resolution, contemplated by some members of the National Assembly, that urged "the FSC to revoke approval for Lone Star's excess shareholding immediately following release of the BAI Report; (2) resisted calls for corrective action against Lone Star following its February 2008 conviction in the Stock Price Manipulation Case, when Lone Star still had an opportunity to appeal; and (3) decided *not* to impose the heightened form of penalty that various scholars, politicians, and civic groups urged the FSC to impose. As even [redacted] recognised following the FSC's approval of Lone Star's sale to Hana, 'the Korean Financial Services Commission, in its ruling to allow Lone Star to sell its shares of KEB, resisted pressure from labor groups, opposition politicians, and civil activists to impose penalties and other punitive conditions on the sale.'"

⁹⁹⁴ Exhibit C-256 / R-150, Second High Court Judgement, Stock Price Manipulation, p. 7, n. 1 and p. 44, n. 14.

⁹⁹⁵ Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation, pp. 28-29:

E. [redacted] [*sic*] *Involvement in the Announcement*
Based on the evidences adopted and inspected by the lower court and High Court before and after remand, the following facts are accepted:
[redacted] [*sic*] *discussed holding the board meetings of KEB*

As such, Defendant [REDACTED] [REDACTED] in conspiracy with [REDACTED] [REDACTED] and [REDACTED] intentionally used deception for the purpose of gaining unjust profit in relation to the trade of securities and other transaction which resulted in Defendants KEB and LSF-KEB's profit of 5 billion won.⁹⁹⁶ [emphasis added]

and KEBCS on separate dates with other directors appointed by Lone Star Fund and officers from Citigroup at the November 19, 2003 meeting at the coffee shop to lower the exercise price of appraisal rights held by opposing shareholders and also suggested making the Announcement between such dates; he instructed [REDACTED] to analyze legal issue of the said plan at the meeting at the coffee shop and played a leading part in including the Announcement in the press release; and during a conference call with Kim & Chang and Citigroup on November 24, 2003, he confirmed that a reduction of capital was not necessary for the merger.

⁹⁹⁶ Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation, pp. 34-37:

1. Defendant [REDACTED] [REDACTED] Violation of SEA

In the course of promotion of Lone Star Fund's policy to merge KEBCS, subsidiary of Defendant KEB which had suffered liquidity crisis due to rapid increase of default rate of credit card users, into Defendant KEB, Defendant [REDACTED] [REDACTED] in conspiracy with [REDACTED] [REDACTED] and [REDACTED] appointed as directors of Defendant KEB by Lone Star Fund, made up his mind to artificially decrease the stock price of KEBCS for the purpose of solving the increase of merger cost by high price of appraisal right of minority shareholders of KEBCS dissenting such merger when the stock price of KEBCS remained high and the excessive decrease of Defendant LSF-KEB's ownership interest in Defendant KEB, the surviving company of merger.

[...]

3. Defendant [REDACTED] [REDACTED] Breach of Trust and Tax Evasion

A. Violation of Act on the Aggravated Punishment, etc. of Specific Crimes relating to Sale of Seoul claim (Breach of Trust)

Defendant [REDACTED] [REDACTED] committed the following crimes in conspiracy with [REDACTED]

[...]

B. Crimes relating to Sale of Kia claim

[...]

In such circumstances, Defendant [REDACTED] [REDACTED] committed following crimes in conspiracy with [REDACTED] in connection with the compensation for Lone Star International's damages by Boosung claim:

1) Violation of Act on the Aggravated Punishment, etc. of Specific Crimes (Breach of Trust)

[...]

2) Violation of Act on the Aggravated Punishment, etc. of Specific Crimes (Tax)

██████████ representative of Defendant LSF-KEB, violated the SEA with respect to the business of Defendant LSF-KEB's business as mentioned in paragraph 1 above, in conspiracy with Defendant ██████████ and ██████████. As such, Defendant LSF-KEB gained profit equivalent to 10,002.5 million won.⁹⁹⁷ [emphasis added]

710. Other foreign investors with which Lone Star likes to compare itself did not have the stigma of criminal convictions.

XII. DETERMINATION OF LIABILITY RELATING TO ALLEGED BREACHES OF THE 2011 BIT BY FSC MISCONDUCT

711. The Tribunal has already ruled on jurisdictional grounds that the allegations of Korean State misconduct before 27 March 2011 are not actionable. Further, the Claimants have not demonstrated actionable fault with respect to Korea's tax treatment of Lone Star's investments. When the failed claims are stripped away, there remains the allegation of Korea's wrongful treatment of LSF-KEB's sale of KEB shares to Hana and in particular the alleged manipulation of the approval process by the FSC to impose a price reduction. The result, Lone Star says, was a reduction forced on it under duress by a self-interested regulator seeking to appease political and public hostility to LSF-KEB as an "Eat and Run" foreign investor.

712. The Respondent, on the other hand, characterises as self-inflicted Lone Star's loss in the reduced price of its control premium.

A. KOREA'S ACTS AND OMISSIONS DENIED THE CLAIMANTS FAIR AND EQUITABLE TREATMENT

713. The Claimants contend that the Respondent violated its obligations under Article 2(2) of the 2011 BIT, which provides that the Claimants' investments in Korea "shall at all times be accorded fair and equitable treatment."⁹⁹⁸ The Fair and Equitable Treatment obligation is intended to ensure that foreign investors are treated reasonably and protects their investments from unfair, arbitrary or otherwise wrongful interference by the State.

⁹⁹⁷ Exhibit C-256 / R-150, Second High Court Judgment, Stock Price Manipulation, p. 36.

⁹⁹⁸ Exhibit C-001, 2011 BIT, Art. 2(2).

714. The Claimants cite *Tecmed v. Mexico*⁹⁹⁹ and related jurisprudence for the proposition that Fair and Equitable Treatment comprises a number of component obligations:

- protection of the reasonable legitimate expectations of foreign investors;
- conduct in good faith;
- procedural propriety and due process;
- non-discrimination; and
- no arbitrariness in decision-making.¹⁰⁰⁰

715. The Parties also made arguments on procedural propriety in the context of FET about the FSC as well as tax that are not explicitly addressed in this section.¹⁰⁰¹ Those arguments are subsumed in the discussion that follows.

⁹⁹⁹ Memorial, para. 542, citing **Exhibit CA-069**, *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("*Tecmed v. Mexico*"), para. 154.

¹⁰⁰⁰ Memorial, para. 543, referring to **Exhibit CA-026**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 ("*Frontier v. Czech Republic*"), para. 284; **Exhibit C-006**, *Biwater Gauff v. Tanzania*, para. 602; **Exhibit CA-005**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178. The *Paushok* tribunal, citing *Rumeli v. Kazakhstan*, also found that fair and equitable treatment "cannot be interpreted as being limited to the protection of legitimate expectations and non-discrimination but covers a number of other principles" including: "transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations;" see **Exhibit CA-065**, *Paushok v. Mongolia*, para. 253. See also **Exhibit CA-058**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("*Saluka v. Czech Republic*"), para. 301 ("[T]he 'fair and equitable treatment' standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors"); para. 307 ("A foreign investor protected by the Treaty may in any case properly expect that the [host State] implements its policies *bona fide* by conduct that is, as far as it affects the investors' [*sic*] investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination"); and para. 309 ("The 'fair and equitable treatment' standard ... must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the [host State] that clearly provides disincentives to foreign investors"). See further **Exhibit CA-049**, *PSEG Global Inc. and Konya Ilgin Electric Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID No. ARB/02/5, Award, 19 January 2007 ("*PSEG v. Turkey*"), paras. 240-250; **Exhibit CA-066**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 ("*Siemens v. Argentina*"), para. 300; **Exhibit CA-042**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD v. Chile*"), paras. 112-113; **Exhibit CA-004**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("*Azurix v. Argentina*"), para. 360.

¹⁰⁰¹ See, e.g., Memorial, paras. 592-593; Reply, paras. 1375-1384; Rejoinder, paras. 1155-1171.

(1) Legitimate Expectations

716. The Claimants refer to the *Saluka v. Czech Republic* award's *dictum* that in undertaking to provide Fair and Equitable Treatment, a State "must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations ... and must grant the investor freedom from coercion or harassment by its own regulatory authorities."¹⁰⁰²
717. The Claimants allege that the Respondent violated their "basic expectations."¹⁰⁰³ At a minimum, the Claimants argue, they reasonably and legitimately expected (i) that the FSC would abide by the 30- and 60-day deadlines for decision on HSBC's and Hana's applications;¹⁰⁰⁴ (ii) that the Respondent would act in good faith; (iii) that the Claimants would be able to earn such returns on their shareholding "as the bank's financial performance might permit, in the form of prudent and reasonable dividends;"¹⁰⁰⁵ and (iv) that they would be able to dispose of their investments once made¹⁰⁰⁶ and to repatriate the proceeds.
718. The Respondent accepts that the obligation to provide fair and equitable treatment includes protections for legitimate expectations the investor had at the time of investment. However, for this standard to apply, there must be some form of representation or assurance by the government itself, upon which the investor thereafter relied in making its decision to invest.¹⁰⁰⁷ This standard is not satisfied by the Claimants' reliance on Korea's alleged deviation from domestic laws and procedures. Primarily, the Claimants rely on vague notions, such as "transparency," "consistency," "stability," "even-handedness" and "rule

¹⁰⁰² Exhibit CA-058, *Saluka v. Czech Republic*, paras. 302, 308.

¹⁰⁰³ Exhibit CA-069, *Tecmed v. Mexico*, para. 154. The tribunal stated that a Fair and Equitable Treatment provision, when interpreted "in light of the good faith principle established by international law, requires the Contracting Parties [to the Agreement] to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment" [emphasis added]. See also Exhibit CA-042, *MTD v. Chile*, paras. 114-115 (endorsing the *Tecmed v. Mexico* award standard of fair and equitable treatment as protecting "basic expectations").

¹⁰⁰⁴ Reply, para. 1333.

¹⁰⁰⁵ Reply, para. 1338.

¹⁰⁰⁶ Memorial, para. 529.

¹⁰⁰⁷ Rejoinder, para. 1100; Counter-Memorial, para. 879.

of law,”¹⁰⁰⁸ ignoring the requirement that the investor must “legitimately have been led by [the host State] to expect” that the State would act—or refrain from acting—in a certain way.¹⁰⁰⁹ The Respondent also contends that the Claimants must establish that the Respondent acted out of an improper motive.¹⁰¹⁰

719. In short, the Respondent agrees with the “general expectation” that the host State will act in good faith, without discrimination and in accordance with due process but says that these general principles are inherent in the notion of fairness secured by other provisions of the BIT, and neither adds to nor detracts from the requirement that specific expectations will only be protected only if based on specific government conduct on which the investor relied.¹⁰¹¹ According to the Respondent, the legitimate expectations portion of the Claimants’ claim is nothing more than repackaging of the same allegations of breaches of local law that they have advanced in virtually every other part of their legal argument.¹⁰¹²
720. The Respondent further points out¹⁰¹³ that a BIT does not guarantee particular returns to the investor¹⁰¹⁴ and that the fair and equitable treatment analysis needs to acknowledge the regulatory rights and responsibilities of the State, in addition to the importance of protecting the investment.¹⁰¹⁵ Moreover, States are afforded a considerable amount of deference with respect to regulatory and administrative measures.¹⁰¹⁶

(2) The Expectation that the FSC Would Respect Statutory Deadlines

721. The Claimants presented a chart of eleven bank approvals since 1999 (see below) to demonstrate the disparity in processing times.

¹⁰⁰⁸ Rejoinder, para. 1101, citing Reply, paras. 1328-13330, 1340.

¹⁰⁰⁹ Rejoinder, para. 1103, citing **Exhibit RA-035**, *AES Summit Generation Limited v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (“*AES v. Hungary*”), para. 9.3.26.

¹⁰¹⁰ Rejoinder, para. 1140.

¹⁰¹¹ Rejoinder, para. 1108, citing **Exhibit CA-766**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008; **Exhibit CA-049**, *PSEG v. Turkey*; **Exhibit RA-298**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014.

¹⁰¹² Rejoinder, para. 1105.

¹⁰¹³ Rejoinder, para. 1098.

¹⁰¹⁴ Counter-Memorial, para. 875.

¹⁰¹⁵ Counter-Memorial, para. 876.

¹⁰¹⁶ Counter-Memorial, paras. 877-878.

722. The Claimants rely on the table below to illustrate their complaint:¹⁰¹⁷

| Applicant | Seller | Target | Days of Review Period | Remarks |
|------------------------------|---|---|---|---|
| Commerzbank | Korea Exchange Bank (32.39%) | Korea Exchange Bank | Approximately 20 days (May 28, 1998 at the earliest to July 24, 1998) | <i>Banking Act</i> |
| KEXIM | Not Applicable (Issuance of new shares) | Korea Exchange Bank | Approximately 42 days (February 5, 1999 at the earliest to April 5, 1999) | <i>Banking Act</i> (Indirect investment by Bank of Korea through Export Import Bank of Korea) |
| Goldman Sachs Private Equity | Kookmin Bank (17.066%) | Kookmin Bank | Approximately 45 days (April 12, 1999 at the earliest to June 11, 1999) | <i>Banking Act</i> |
| Newbridge Capital | Korea Deposit Insurance Corporation ("KDIC") | Korea First Bank | Approximately 18 days (December 1, 1999 at the earliest to December 24, 1999) | <i>Banking Act</i> |
| Allianz AG | Hana Bank (12.36%) | Hana Bank | Approximately 15 days (February 19, 2000 to March 10, 2000) | <i>Banking Act</i> |
| Carlyle, JP Morgan | KorAm Bank (Subscription of newly issued DR) | KorAm Bank | Approximately 18 days (August 16, 2000 to September 8, 2000) | <i>Banking Act</i> |
| Shinhan Financial Holdings | KDIC | Chohung Bank | Approximately 31 days (July 25, 2003 to September 5, 2003) | [<i>Financial Holding Companies Act</i>] Authorization on acquisition of a financial company as a subsidiary of a Financial Holding Company (FHCA Article 16) |
| Lone Star | KEXIM, Commerzbank and Korea Exchange Bank (new shares) | Korea Exchange Bank | Approximately 19 days (September 2, 2003 to September 26, 2003) | <i>Banking Act</i> |
| Citibank N.A. | Carlyle, JP Morgan | KorAm Bank (renamed as Citibank Korea Inc.) | Approximately 8 days (March 17, 2004 to March 26, 2004) | <i>Banking Act</i> |
| Standard Chartered Bank | Newbridge Capital, KDIC | Korea First Bank (renamed as SC First Bank) | Approximately 28 days (March 9, 2005 to April 15, 2005) | <i>Banking Act</i> |
| Hana Financial Holdings | Lone Star | Korea Exchange Bank | Approximately 295 days (December 13, 2010 to January 27, 2012) | [<i>Financial Holding Companies Act</i>] Authorization on acquisition of a financial company as a subsidiary of a Financial Holding Company (FHCA Article 16) |

¹⁰¹⁷ Memorial, para. 219; Exhibit CWE-015, Expert Report of [REDACTED] 10 October 2013 (" [REDACTED] First Expert Report"), paras. 5-16.

723. The Claimants contend that even if the 30- and 60-day deadlines were not binding, the disparity in processing times indicates that the FSC was working on a different agenda than its statutory mandate.
724. More broadly, the Claimants allege that the FSC delay frustrated the ability of LSF-KEB to dispose of its investment after a lock-up period of two years thereby “eviscerat[ing] the arrangements in reliance upon [which Lone Star] was induced to invest.”¹⁰¹⁸

The Tribunal’s Ruling on Regulatory Delays

725. The Tribunal has already held that the timing of the approval process is more flexible than envisaged by the Claimants.¹⁰¹⁹ The Korean Supreme Court observed with respect to rules for administrative approval that the processing period “is merely a hortatory provision that encourages the approval process to be conducted as swiftly as possible, and is not a mandatory provision or validity provision.”¹⁰²⁰ In any event, as noted by the Respondent, “a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law.”¹⁰²¹
726. As the Tribunal pointed out above at paragraph 526, the issue is not simply delay, but improper motive for the delay.

(3) The Expectation of Unimpeded Receipt of “Prudent and Reasonable Dividends”

727. As discussed above at paragraphs 684 and following, the Claimants argue that the financial regulators were responsible for KEB’s decision not to pay a 2011 year-end dividend and to deny Lone Star’s request for a further dividend in February 2012 “for political reasons, despite its lack of authority to block the dividends.”¹⁰²²

¹⁰¹⁸ Memorial, para. 551, citing **Exhibit C-055**, Shareholders Agreement Between Commerzbank AG, Export-Import Bank of Korea and LSF-KEB Holdings, SCA, 31 October 2003, Sec. 4.1(a); **Exhibit CA-013**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 611.

¹⁰¹⁹ See above, paragraph 524.

¹⁰²⁰ [REDACTED] First Expert Report, para. 34, referring to **Exhibit RA-142**, Supreme Court of Korea, Case No. 95Nu10877, Judgment, 20 August 1996.

¹⁰²¹ Rejoinder, para. 1125, citing **Exhibit RA-019**, *Rompetrol v. Romania*, para. 174.

¹⁰²² Reply, para. 246.

The Tribunal's Ruling on Interference with Dividends

728. The Tribunal has already rejected at paragraphs 691 to 694, the allegation of wrongful interference by the FSC in KEB's dividend policy.

(4) The Expectation that the Respondent Would Act in Good Faith

729. The Claimants characterise the FSC's various orders and directions in the Hana approval process in the Fall of 2011 as merely attempts to divert attention from its unlawful political posture by appeasing Lone Star's critics with a series of unnecessary orders against LSF-KEB, such as: (i) stripping LSF-KEB of its majority voting rights, (ii) unnecessarily ordering a sale of LSF-KEB's excess shareholding, and (iii) attempting to evict the directors appointed by LSF-KEB from KEB's Board of Directors.¹⁰²³

730. The Respondent notes that the orders simply implemented the statutory scheme for offenders convicted of a serious financial crime.

731. In a related pleading,¹⁰²⁴ the Claimants contend that good faith also entails Article 2(3) of the 2011 BIT which provides that:

3. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.

732. According to the Claimants, the Respondent's "intentional disregard of its own law governing bank acquisitions, the use of the "legal uncertainty" excuse as pretext to cover for political and discriminatory motivations, and its unlawful and abusive taxation of the Claimants' investment returns – give rise to breaches of the Respondent's obligation of good faith."¹⁰²⁵

733. The Respondent notes that the Parties are agreed that a finding of bad faith requires proof that a respondent State's conduct was "patently arbitrary, unjust or idiosyncratic" or

¹⁰²³ Memorial, para. 589.

¹⁰²⁴ Reply, para. 1363.

¹⁰²⁵ Reply, para. 1363.

“manifestly irrational, arbitrary and perverse” or constituted the “wilful disregard of due process of law or an extreme insufficiency of action.”¹⁰²⁶

734. According to the Respondent, a claimant must also demonstrate, as a threshold matter, that the respondent State acted with an improper motive and this requires the claimant to prove concrete acts by the State that “evidenced a clear intention” to damage or interfere with the claimant’s investment.¹⁰²⁷
735. The Claimants contend that “[a]ctions based on the vicissitudes of domestic politics are inconsistent with...good faith.”¹⁰²⁸ The Respondent replies that even if the Tribunal were to find that Korean officials were motivated in part by domestic political views of Lone Star’s actions in Korea, government actions take account of politics do not in and of themselves constitute bad faith conduct. A claimant has to demonstrate that these kinds of political concerns are the *controlling rationale* for the respondent’s actions, to the exclusion of objective concerns.¹⁰²⁹

The Tribunal’s Ruling on the Violation of the Good Faith Principle

736. In the view of the Tribunal majority, it makes no difference in this case whether good faith is considered a branch of FET or a stand-alone ground. The FSC’s “controlling rationale” for its delay tactics in the autumn of 2011 was to force a price reduction to placate political opposition to the size of Lone Star’s “eat and run” profits.
737. The Parties also appear to agree that bad faith actions include conduct that is “patently arbitrary, unjust or idiosyncratic” or “manifestly irrational, arbitrary and perverse” as well as the “wilful disregard of due process of law or an extreme insufficiency of action.”¹⁰³⁰ It is on this general basis that the Tribunal proceeds.

¹⁰²⁶ Reply, para. 1361; Rejoinder, para. 1139.

¹⁰²⁷ Counter-Memorial, paras. 907-908; Rejoinder, para. 1140.

¹⁰²⁸ Rejoinder, para. 1142.

¹⁰²⁹ Rejoinder, paras. 1142-1143.

¹⁰³⁰ Reply, para. 1363; Rejoinder, para. 1139.

738. The FSC's tactics had nothing to do with Hana's suitability as the purchaser of LSF-KEB's shares. It was widely expected that the Hana transaction at a significantly higher price would be approved by the FSC in March 2011. However, the KEBCS stock manipulation conviction of 10 March 2011 gave the FSC the opportunity to pressure Lone Star to reduce its price for the KEB shares by imposing a deadline for their disposal while at the same time withholding its approval of the Hana purchase even though the conviction of LSF-KEB as vendor had nothing to do with the qualifications of Hana as purchaser. Nothing happened to Hana between March 2011 (when it was expected to be approved) and the autumn of 2011 (when the FSC continued to withhold approval) to make Hana a less attractive candidate for approval in the eyes of the FSC as purchaser of LSF-KEB's shares in KEB.
739. The fact the FSC was apparently expected to discharge its mandate properly in March 2011 does not relieve it from liability for refusing to do so in the autumn of 2011.
740. In the view of the Tribunal majority, the "controlling rationale" of the FSC's behaviour was the growing political pressure. The Tribunal majority rejects Korea's arguments that the FSC's behaviour was motivated by concerns about Hana or discharge of its "prudential" responsibilities.
741. The misconduct of Lone Star did not relieve the FSC from its obligation to process in good faith and expeditiously the Hana application (especially after Lone Star had abandoned its right of appeal on 12 October 2011.)¹⁰³¹ The FSC was then in a position to take whatever action it deemed appropriate in furtherance of its "prudential role." Instead, in the view of the Tribunal majority, it pursued a policy of price reduction which was not part of its mandate and was undertaken entirely in furtherance of its own institutional self-interest. In doing so, the Tribunal finds that the Respondent failed to act in good faith towards these investors.

¹⁰³¹ Lone Star states that it decided not to appeal in order to put an end to "legal uncertainty" and thereby push the FSC to approve the sale to Hana. However, the Tribunal is entitled to treat the criminal conduct as settled fact and the issuance of the orders as legitimate consequences of the convictions.

(5) The Expectation that the Claimants would be able to Dispose of their Investments Unimpeded by FSC Misconduct

742. The Claimants contend that the FSC imposed on them a USD 433 million share price reduction contrary to their reasonable and legitimate expectation of a FSC approval process free of FSC conflicts of interest.
743. As to the Respondent's argument that LSF-KEB freely accepted the price reduction as being in its own commercial best interest, the Claimants refer to the decision in *Total v. Argentina* wherein the investor had been 'forced' to accept business conditions much less favourable than the terms originally agreed. The tribunal described this scheme as a "kind of forced, inequitable, debt-for-equity swap, not due to unfavourable market conditions or a company's crisis ... but due to governmental policy and conduct by Argentina." As such, it was held to be a compensable breach of the State's Fair and Equitable Treatment obligation.¹⁰³²
744. The Claimants complain that following the final conviction of LSF-KEB in the Stock Manipulation Case, the FSC placed Lone Star in a "Catch-22" situation by its Disposition Order of 18 November 2011 that required LSF-KEB to divest its KEB shares within six months,¹⁰³³ even as the FSC continued to prevent LSF-KEB from doing just that by failing to approve Hana's application to acquire those shares. In their view, the FSC recognised the illegality of its manoeuvres and attempted to protect itself from public criticism by trying to conceal from Lone Star its pressure on Hana.¹⁰³⁴
745. The conviction, Lone Star says, for which it paid a very substantial financial penalty, did not relieve the FSC from its duty to deal fairly and expeditiously with Hana's application. The Claimants had at the time of their investment a reasonable and legitimate expectation that any legal procedure involving the KEB shares would proceed according to the criteria

¹⁰³² Memorial, para. 596, referring to Exhibit CA-072, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 ("*Total v. Argentina*"), paras. 336-338 ("If not 'forced', it was certainly strongly induced by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses.").

¹⁰³³ Exhibit C-274, "Financial Services Commission Orders Lone Star Share Disposal Within Six Months," *FSC Press Release*, 18 November 2011; Exhibit C-276, Disposition Order.

¹⁰³⁴ Memorial, para. 582.

set by the applicable statutes, which were limited to the attributes of the potential purchaser not the vendor.¹⁰³⁵

746. The Respondent attributes the extended FSC administrative approval process to the criminal conduct of LSF-KEB which went to the heart of Lone Star's self-inflicted predicament because it was provided by statute (not FSC discretion) that conviction of such a "serious financial crime" rendered LSF-KEB ineligible to retain its control interest in KEB.
747. In the Respondent's view, the "prudential" role of the FSC in supervising the country's financial system was no less important than the task of considering approval of potential new investors. The criminal conduct of LSF-KEB justified the FSC "Wait and See" policy of inaction.

The Tribunal's Ruling on the Relevance of the Conviction of LSF-KEB of a "Serious Criminal Offence" to the Reasonableness and Legitimacy of the Claimants' Expectations

748. The Claimants were in a "Catch-22" situation, but it was a Catch-22 to which their actions had materially contributed. As a result of LSF-KEB's misdeeds it had been ordered to divest KEB shares in excess of 10% and time was running out on any chance of capturing some or all of the control premium. If the Hana deal fell through (and, as stated, the existing SPA expired on 30 November 2011), there was little prospect that a new purchaser could be found and approved before the 18 May 2012 deadline of the Disposition Order. Without an approved buyer, LSF-KEB would have to sell its KEB shares on the open market at a substantially reduced share price. Mr. [REDACTED] recognised the tightening time pressure by quickly abandoning Lone Star's right to appeal the 6 October 2011 conviction even though by doing so Lone Star put itself at risk of just such a fate.
749. The Claimants make a property rights argument. Lone Star argues that even if LSF-KEB could not continue to control KEB after 18 May 2012, a tentative purchaser would acquire

¹⁰³⁵ Memorial, para. 552, referring to Exhibit CWE-015, [REDACTED] First Expert Report, paras. 43-44, 46-47; Exhibit CWE-009, Expert Report of [REDACTED] 10 October 2013 ("[REDACTED] First Expert Report"), paras. 44, 52-55, 74-76.

the benefit of control of the bank (and reasonably ought to be willing to pay for that value). Hence in Lone Star's view, it was, despite the conviction, entitled to the full value of its property. However, Lone Star faced a regulatory problem, not a property rights problem. Any prospective purchaser would impose a condition precedent of FSC approval. Without regulatory approval, the transaction could not proceed and the expected return on investment would not be realised.

750. The FSC was also in a "Catch-22" position. The FSC was not only creating problems for Hana and Lone Star, but at the same time creating adverse publicity internationally about Korea's hostile treatment of foreign investment. Despite the denials of FSC Chairman Kim, the majority of the Tribunal concludes for the reasons stated below that public and Parliamentary wrath dictated the FSC's decision-making, and the FSC succumbed to the pressure by orchestrating a significant reduction in the purchase price of KEB by Hana.

751. In doing so, as will be discussed (see paragraphs 779 and following), the Respondent, in the view of the Tribunal majority, violated its treaty obligation to provide the investors with Fair and Equitable Treatment.

(6) Claim to Full Protection and Security

752. The Claimants also rely on Article 2(2) of the 2011 BIT, which provides that Claimants' investments in Korea "shall enjoy full and continuous protection and security in [Korean] territory."¹⁰³⁶ This includes, the Claimants argue, a stable business environment, as well as security against commercial and legal harassment that impairs the normal functioning of the investor's business.¹⁰³⁷

753. The Claimants also say that the Respondent violated this duty by subjecting the Claimants' investments to other "commercial, legal, and physical harassment that impaired the normal functioning and disposal of Lone Star's business" and the Respondent also "created

¹⁰³⁶ Exhibit C-001, 2011 BIT, Art. 2(2).

¹⁰³⁷ Memorial, paras. 607-609, citing, *inter alia*, Exhibit CA-015, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 2 August 2007, para. 7.4.15; Exhibit CA-006, *Bivater Gauff v. Tanzania*, para. 730.

conditions that facilitated actions by third parties [e.g., Hana] that injured Lone Star's interests."¹⁰³⁸

754. The Claimants describe the Full Protection and Security standard as creating "a general obligation for the host State to exercise due diligence in the protection of foreign investment."¹⁰³⁹ The protection, the Claimants say, is no longer interpreted as limited to the physical security of an investment. The preponderant view now requires that the State not only safeguard foreign investments from physical violence, but also provide legal protection for the investment.¹⁰⁴⁰ This is because, as the *Azurix v. Argentina* tribunal noted, "the stability afforded by a secure investment environment is as important [as physical security] from an investor's point of view."¹⁰⁴¹ Accordingly, the Treaty's Full Protection and Security obligation requires Korea to provide a stable business environment, as well as security against commercial and legal harassment that impairs the normal functioning of the investor's business.¹⁰⁴²

¹⁰³⁸ Memorial, para. 605.

¹⁰³⁹ Memorial, para. 606, citing **Exhibit CA-019**, R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (Kluwer Law International: 1995) (excerpt), p. 61. See also **Exhibit CA-058**, *Saluka v. Czech Republic*, para. 484 ("The host State is ... obliged to exercise due diligence"); **Exhibit CA-006**, *Biwater Gauff v. Tanzania*, paras. 724-728 (citing awards recognizing an obligation of "due diligence").

¹⁰⁴⁰ Memorial, para. 607, referring to **Exhibit CA-061**, C. Schreuer, "Full Protection and Security," in *Journal of International Dispute Settlement* (2010), p. 5 ("The applicability of a treaty provision on protection and security to direct attacks on the investor's person and property by organs of the host State is beyond doubt"); **Exhibit CA-004**, *Azurix v. Argentina*, paras. 406-408; **Exhibit CA-006**, *Biwater Gauff v. Tanzania*, para. 729 ("The Arbitral Tribunal adheres to the *Azurix* holding that when the terms 'protection' and 'security' are qualified by 'full', the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of 'full security' only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments."). See also **Exhibit CA-043**, *National Grid p.l.c. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 189 ("The Tribunal concludes that the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets"); **Exhibit CA-066**, *Siemens v. Argentina*, para. 303; **Exhibit CA-026**, *Frontier v. Czech Republic*, para. 263 ("[I]t is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.").

¹⁰⁴¹ Memorial, para. 607, citing **Exhibit CA-004**, *Azurix v. Argentina*, para. 408.

¹⁰⁴² Memorial, paras. 608-609, citing, *inter alia*, **Exhibit CA-015**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 2 August 2007, para. 7.4.15; **Exhibit CA-006**, *Biwater Gauff v. Tanzania*, para. 730.

755. In the Claimants' view, the Respondent severely undermined the Claimants' legal protection and security by "arbitrarily casting aside the requirements of Korean law with respect to HSBC's and Hana's applications to acquire LSF-KEB's shares in KEB, and by engaging in a continuous campaign of harassment, unfair treatment [(including tax treatment)], and intervention in the management of the investment."¹⁰⁴³
756. According to the Respondent, notwithstanding the Claimants' broader interpretation of Full Protection and Security focusing on *legal* security, the evidence demonstrates that Korea has provided the "legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights."¹⁰⁴⁴ The evidence shows that the Claimants extensively involved the Korean judiciary in their challenge to every tax assessment relating to this arbitration.¹⁰⁴⁵ The relevant tax laws were consistent with relevant international standards. On any view, the Respondent says, it "provided the legal security that was allegedly due under the Treaty."¹⁰⁴⁶

The Tribunal's Ruling on the Violation of the Full Protection and Security Standard

757. While the Full and Continuous Protection and Security standard is distinct from Fair and Equitable Treatment, it is evident from the Claimants' own list of complaints that in their view, there is a considerable factual overlap. Many of the same events are placed under both headings. Given the ruling of the Tribunal majority in respect of Fair and Equitable Treatment, it is unnecessary for the majority to consider further the claim to Full and Continuous Protection and Security. As to the tax treatment, the Tribunal has unanimously rejected any allegation of violation of the BIT.
758. In the Tribunal's view, the tax treatment of the KEB dividends and the withholding tax on the sale to Hana of the KEB shares did not amount to harassment but was a routine

¹⁰⁴³ Memorial, para. 613. See also Reply, paras. 1397-1399.

¹⁰⁴⁴ Rejoinder, para. 1195, citing Reply, para. 1390 (citing, in turn, Exhibit CA-026, *Frontier v. Czech Republic*, para. 263).

¹⁰⁴⁵ Counter-Memorial, para. 946; Rejoinder, para. 1195.

¹⁰⁴⁶ Rejoinder, para. 1195.

application of a tax system whose relevant provisions were quite consistent with international standards including the OECD Guidelines.

B. MOST-FAVOURLED NATION AND NATIONAL TREATMENT

759. With respect to investments and returns, Article 3(1) of the 2011 BIT requires the Respondent to accord "treatment no less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable to investors."¹⁰⁴⁷ With respect to investors, Article 3(2) provides that the Respondent "shall in its territory accord to investors of the other Contracting Party as regards the operation, management, maintenance, use, enjoyment and *sale or other disposal of their investments*, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to investors."¹⁰⁴⁸

760. The Claimants cite the *Parkerings-Compagniet v. Lithuania* case for the following proposition:

*Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. [...] The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances.*¹⁰⁴⁹

761. The Claimants contend that they were treated differently, and disadvantageously, in two respects:

¹⁰⁴⁷ Exhibit C-001, 2011 BIT, Art. 3(1).

¹⁰⁴⁸ Exhibit C-001, 2011 BIT, Art. 3(2) [emphasis added]. See generally, Exhibit CA-054, *S.D. Myers, Inc. v. Government of Canada*, NAFTA, First Partial Award on the Merits, 13 November 2000, paras. 252, 254.

¹⁰⁴⁹ Memorial, para. 623, citing Exhibit CA-047, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 368-369 (citing, in turn, *Goetz v. Burundi*, para. 121).

- (a) the FSC's delay in the HSBC and Hana applications demonstrates that the Claimants were singled out for adverse treatment in the FSC process compared to both foreign and domestic banking investors;¹⁰⁵⁰ and
 - (b) the tax treatment of Lone Star as compared with Carlyle and Newbridge Capital also shows discrimination.
762. Lone Star contends that since 1998, the FSC has never taken more than 45 days to approve an acquisition (including a mere 19 days when in September 2003 Lone Star acquired its KEB shares). According to the Claimants, all other similar transactions by foreign investors were determined well within the statutory processing periods set by the *Banking Act* and the *Financial Holding Companies Act*.¹⁰⁵¹ In Lone Star's case, by contrast, it took over thirteen months for the FSC to issue its approval of Hana's application¹⁰⁵² and then only after it forced a price reduction.
763. The Claimants argue that the FSC's strategy in failing to act on Hana's application depressed the price that Lone Star could receive for its shareholding relative to other sellers of bank securities.
764. The Respondent denies that the Claimants were (1) treated less favourably than other investors (domestic or foreign) who were "in like circumstances," (2) or that the Claimants' investments were adversely affected as a result, (3) or, in the alternative, that the State did so without a rational justification.¹⁰⁵³ There is no evidence that other investors identified by the Claimants (with whom they invite comparison) were ever the subject of criminal indictments or convictions, nor is there evidence that these other investors had directors, officers or agents implicated in financial crimes or civil misconduct as was LSF-KEB in

¹⁰⁵⁰ As discussed, Lone Star made its investment in KEB contemporaneously with Newbridge Capital, which invested in Korea First Bank, and The Carlyle Group, which invested in KorAm Bank. The Carlyle Group sold its stake in KorAm Bank to Citibank in 2004 and Newbridge Capital sold its stake in Korea First Bank to Standard Chartered Bank in 2005. These investors, Lone Star says, did not suffer the adverse tax treatment inflicted on Lone Star: Memorial, paras. 143, 625.

¹⁰⁵¹ Memorial, para. 528; Exhibit CWE-015, [REDACTED] First Expert Report, paras. 5-16.

¹⁰⁵² Memorial, para. 625. See also Memorial, paras. 228-252, 266-313.

¹⁰⁵³ Rejoinder, para. 1199.

the *Olympus Capital* ICC arbitration.¹⁰⁵⁴ As to the conflict-of-interest issue, “the FSC did not intervene at all (let alone coercively) in the private negotiations between Hana and Lone Star.”¹⁰⁵⁵

The Tribunal’s Ruling on the Violation of the Most-Favoured Nation and National Treatment

765. In light of the majority ruling in respect of Fair and Equitable Treatment, the Tribunal majority finds it unnecessary to make a ruling in respect of the allegation of violation of the Most-Favoured Nation and the National Treatment clause. To do so would add nothing to the establishment of Korea’s liability for what the Tribunal majority regards as the only viable claim, namely the loss of USD 433 million by way of the reduced share price. While the Claimants make arguments comparing the treatment they say they received to the treatment of others who they say were similarly situated, the Tribunal considers it preferable to apply the FET standard directly rather than through the lens of comparative treatment of other entities whose “similarity” of situation is challenged.

C. EXPROPRIATION OF THE CLAIMANTS’ INVESTMENTS

766. Under Article 5(1) of the 2011 BIT, the Claimants’ investments in Korea are protected from being “nationalized, expropriated or otherwise subjected to any other measures having effect equivalent to nationalization or expropriation (hereinafter referred to as ‘expropriation’) in [Korean territory] except for public purposes and against prompt, adequate and effective compensation.” Article 5(1) further provides that any expropriation “shall be carried out on a non-discriminatory basis and under due process of law.”¹⁰⁵⁶
767. The Claimants rely on the decision of the Iran-United States Claims tribunal in *Tippetts v. Iran* that “[a] deprivation or taking of property may occur under international law through interference by a [S]tate in the use of ... property or with the enjoyment of its benefits, even where legal title to the property is not affected.”¹⁰⁵⁷ Moreover, as established by a number

¹⁰⁵⁴ Counter-Memorial, para. 960; Rejoinder, para. 1208; **Exhibit R-365**, *Olympus Capital*.

¹⁰⁵⁵ Rejoinder, para. 1226.

¹⁰⁵⁶ **Exhibit C-001**, 2011 BIT, Art. 5(1).

¹⁰⁵⁷ Memorial, para. 630, citing **Exhibit CA-070**, *Tippetts, Abbott, McCarty and Stratton v. Islamic Republic of Iran and others*, Iran-U.S. Claims Tribunal Case No. 7, Award No. 141-7-2, 29 June 1984, p. 4.

of tribunals, according to the Claimants, an expropriation will occur if the State deprives an investor of a substantial part of the value of its investment.¹⁰⁵⁸ A deprivation of rights that are related to the basic investment can amount to expropriation.¹⁰⁵⁹

768. Thus, the Claimants say, the Respondent expropriated LSF-KEB's investment in KEB because, in the words of Professors Sohn and Baxter, the Respondent "unreasonabl[y] interfere[d] with the use, enjoyment, [and especially the] disposal of [LSF-KEB's investment in KEB] ... to justify an inference that [Lone Star was not] able to ... dispose of [KEB [shares]] within a reasonable period of time after the inception of such interference."¹⁰⁶⁰ It is immaterial, the Claimants say, that LSF-KEB's legal title to its KEB shares was unaffected by the Respondent's actions and inaction.
769. In the case of the Hana transaction, the Claimants argue that the substantial deprivation of LSF-KEB's investment in KEB was complete when the Respondent deprived LSF-KEB of its control of KEB by stripping LSF-KEB of its majority voting rights in excess of 10% of KEB's shares.¹⁰⁶¹ The FSC then proceeded to order LSF-KEB to sell its holdings in KEB in excess of 10% within six months, even as it further delayed acting on Hana's application to acquire that very stake¹⁰⁶² and, at the same time, attempted to evict the directors appointed by LSF-KEB from KEB's board.¹⁰⁶³
770. The Claimants say, in summary, that their primary expropriation claim is that Respondent interfered with LSF-KEB's ability to dispose of its investment in KEB for a "full four years" which is equivalent they say to expropriation or nationalization under the circumstances. In the alternative they say, "the Tribunal may also find that [the] Respondent's interference effected an expropriation of LSF-KEB's valuable rights under

¹⁰⁵⁸ See, e.g., **Exhibit CA-071**, *Tokios Tokelés v. Ukraine*, para. 120.

¹⁰⁵⁹ Memorial, para. 635, citing, *inter alia*, **Exhibit CA-032**, U. Kriebaum, "Partial Expropriation," in 8 *Journal of World Investment and Trade* 1 (February 2007), p. 81.

¹⁰⁶⁰ Memorial, para. 637, citing **Exhibit CA-068**, L. Sohn and R. Baxter, "Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens," in 55 *American Journal of International Law*, p. 553, Art. 10(3)(a).

¹⁰⁶¹ Memorial, para. 292.

¹⁰⁶² Memorial, paras. 292-300.

¹⁰⁶³ Memorial, paras. 309-311.

its share purchase agreements with HSBC and, later, Hana¹⁰⁶⁴ as well as the 2011 year and dividend.¹⁰⁶⁵

771. The Respondent states that there is no expropriation where the government measure (1) allows an investor to retain ownership, title and possession of its investment, (2) permits the investor to extract significant dividends from its investment and (3) allows the investor to exceed its expected return on investment.¹⁰⁶⁶ Even if some of Korea's regulatory actions deprived Lone Star of some of the potential value of its investments or some of the rights associated with its investments, such regulatory interference did not result "in a total or near-total loss of value of the investment *as a whole*" and was well within the "normal bounds of regulatory authority."¹⁰⁶⁷ Diminution of value does not constitute expropriation.¹⁰⁶⁸ The Claimants' investment in KEB was "by any measure ... highly profitable."¹⁰⁶⁹ A limited delay in the disposal of an investment does not constitute permanent deprivation.¹⁰⁷⁰

The Tribunal's Ruling on the Claim of Expropriation

772. In the Tribunal's view, the Claimants have not established any of the elements of an expropriation. The loss of a part of a control premium while leaving the investment and most of the control premium intact does not amount to expropriation.
773. The particulars of the Claimants' expropriation claim are ill founded. LSF-KEB was "stripped" of its majority voting rights because it had been convicted of the serious financial crime of stock manipulation. The FSC took the position that Lone Star representatives who sat on the KEB board by virtue of LSF-KEB's controlling interest should stand down once LSF-KEB's right to control was forfeited by virtue of the conviction. The action may have been premature but it was not an act of expropriation. In

¹⁰⁶⁴ Reply, para. 1422.

¹⁰⁶⁵ Reply, para. 1439.

¹⁰⁶⁶ Rejoinder, para. 1271.

¹⁰⁶⁷ Rejoinder, para. 1242 [emphasis original]; see also para. 1245.

¹⁰⁶⁸ Rejoinder, para. 1246.

¹⁰⁶⁹ Rejoinder, para. 1250.

¹⁰⁷⁰ Rejoinder, Sec. VI.J.1(c).

summary, a financial crime was committed, no appeal was taken, and the Disposition Order followed in accordance with the *Banking Act*.

774. In any event, the only compensable loss to the Claimants in the expropriation scenario is the loss to LSF-KEB on the share price reduction quantified at USD 433 million and this amount is equally (and more appropriately) recoverable under Fair and Equitable Treatment. Accordingly, it is unnecessary to address further the claim of expropriation.

D. OBLIGATION TO ALLOW FREE TRANSFERS

775. Pursuant to Article 6(1) of the 2011 BIT, Korea is required to “guarantee to investors of [Belgium and Luxembourg] the free transfer of their investments and returns,” which include, *inter alia*, “net profit, capital gains, dividends, interest, royalties, fees and any other current income accruing from investments,” as well as “proceeds accruing from the sale or the total or partial liquidation of investments.”¹⁰⁷¹

776. The Claimants argue that the Respondent breached these obligations as follows:¹⁰⁷²

- (a) the Respondent prevented LSF-KEB from liquidating its investment and repatriating the proceeds by blocking LSF-KEB from selling its stake in KEB for several years;
- (b) the Respondent’s imposition of “unlawful” taxes on the liquidation or partial sales of investments by Star Holdings, LSF-KEB, LSF SLF, HL, Kukdong I and Kukdong II impaired the transfers of the full proceeds of their investments;
- (c) the Respondent’s imposition of an “illegitimate” withholding obligation (through Hana) constituted a breach of the free transfer guarantee stated in the BIT. It effectively blocked the remittance of nearly half a billion U.S. dollars by instructing Hana not to transfer funds despite LSF-KEB’s request to Hana and Hana’s

¹⁰⁷¹ Exhibit C-001, 2011 BIT, Article 6(1).

¹⁰⁷² Memorial, paras. 659-662.

contractual obligation to make the remittance.¹⁰⁷³ These funds are held “hostage” in Korea; and

- (d) the Respondent retains the withholding taxes that Credit Suisse withheld from the 2007 block sale of KEB shares and “offset” them against assessments against upper-tier entities in LSF-KEB’s chain of ownership that were reassessed in February 2012. To this day, the Claimants say, the NTS has unlawfully retained these funds, thereby blocking the “free transfers of [LSF-KEB’s] investment and returns”¹⁰⁷⁴ from Korea.

777. The Respondent argues that free transfer clauses simply “protect investors from government controls limiting their ability to transfer funds across borders that already are in their possession.”¹⁰⁷⁵ According to the Respondent, “Claimants do not allege that Korea imposed any such restriction.”¹⁰⁷⁶ Further, according to the Respondent, the 2011 BIT only protects transfers of “*net* profit, capital gains” and other post-tax income. Hence, any type of taxes, including taxes withheld by third parties, do not constitute funds that are covered by Article 6 of the 2011 BIT. The funds retained by NTS were not in LSF-KEB’s possession and therefore are not covered by Article 6. In any event, Respondent argues, Claimants have failed to prove that NTS’s retention of those funds constitutes a restriction on the transfer of LSF-KEB’s investments and returns.¹⁰⁷⁷

The Tribunal’s Ruling on the Violation of the Free Transfer Guarantee

778. In light of the ruling of the Tribunal majority of a clear violation of the Fair and Equitable Treatment obligation, it is not necessary to address point (a). Points (b), (c) and (d) assume that the tax levies were unlawful but in the Tribunal’s view, as has been explained, the assumption is not correct. The Claimants have extensively litigated the tax issues at every

¹⁰⁷³ Exhibit RA-258, Statement of Facts and Circumstances, paras. 389-390.

¹⁰⁷⁴ Exhibit C-001, 2011 BIT, Article 6(1).

¹⁰⁷⁵ Rejoinder para. 169.

¹⁰⁷⁶ Rejoinder para. 169.

¹⁰⁷⁷ Rejoinder, para. 1373.

level of the Korean court system and, it seems, may continue to do so. For reasons already discussed, the tax treatment of the Claimants did not violate the 2011 BIT.

XIII. THE CLAIMANTS HAVE ESTABLISHED A VIOLATION OF THE TREATY OBLIGATIONS TO AFFORD FAIR AND EQUITABLE TREATMENT

779. The Claimants legitimately expected to receive the returns on their investment to which they were contractually entitled and, if so desired, to be able to dispose of investments once made without the intervention by a regulator acting to advance its own political agenda rather than performing its statutory mandate. In the words of the *Saluka v. Czech Republic* tribunal, a State “must grant the investor freedom from coercion or harassment by its own regulatory authorities.”¹⁰⁷⁸
780. As the majority of the Tribunal has explained, the FSC followed its “Wait and See” policy (even after there was nothing left to “Wait and See”) until it had orchestrated a share price reduction. LSF-KEB had been convicted on 6 October 2011 and Lone Star had declared on 12 October 2011 that it would not appeal. Despite the protestation of the FSC that for years it had given priority to its “prudential” role, it gave no indication of exercising that role when, in its own terms, the “prudential” mandate was ripe to be exercised. The FSC did nothing “prudentially.” It merely initiated the process to force LSF-KEB to sell its shares which sale the FSC had itself blocked by inaction since Hana first applied for approval the previous December.
781. In the view of the Tribunal majority, the course of FSC conduct was arbitrary and unreasonable within the definition proposed by the Respondent itself as a measure that does not bear a reasonable relationship to a rational policy objective.¹⁰⁷⁹ The Claimants say a measure is arbitrary if *either* (i) the measure lacks legitimate policy aim or (ii) if the measure is not taken reasonably in furtherance of that legitimate policy aim.¹⁰⁸⁰ In the

¹⁰⁷⁸ Exhibit CA-058, *Saluka v. Czech Republic*, para. 308.

¹⁰⁷⁹ Counter-Memorial, para. 810; Exhibit RA-035, *AES v. Hungary*, paras. 10.3.8-10.3.9; Exhibit CA-058, *Saluka v. Czech Republic*, paras. 309, 460.

¹⁰⁸⁰ Reply, para. 1235.

view of the Tribunal majority, the FSC misconduct was not directed to a “legitimate policy aim” but to its own self-interest.

782. According to the majority of the Tribunal, the successful efforts of the FSC to secure a price reduction despite its acknowledgment to the National Assembly that the terms of a private agreement, including price, was not within the FSC mandate, and delaying approval until a price reduction was achieved, the FSC exercised its regulatory role arbitrarily and in bad faith.
783. While LSF-KEB could have refused the price reduction and submitted to the loss of the control premium in an open market sale pursuant to the Disposition Order, it was neither fair nor equitable to place Lone Star in that dilemma simply to further the FSC’s domestic political interests.¹⁰⁸¹
784. LSF-KEB accepted the reduced price under protest only when confronted with the FSC’s improper intervention in a private contract with an improper agenda based on its own conflict of interest.
785. The Tribunal by majority therefore does not accept the Respondent’s contention that LSF-KEB freely entered into the modified SPA with Hana on 3 December 2011 and thereby broke any causal link between the FSC treatment and the loss. Lone Star had long warned the Respondent that it would not accept financial losses sustained in Korea’s regulatory process but would pursue the entirety of such losses in an ICSID arbitration, as has in fact happened.
786. In effect, LSF-KEB signed the revised 3 December 2011 SPA to mitigate the losses to be claimed in the international arbitration.

¹⁰⁸¹ Exhibit CA-072, *Total v. Argentina*, paras. 336-338. In the words of the tribunal in *Total v. Argentina*, the investor was “forced” to accept an outcome (or, “[i]f not ‘forced, it was strongly induced by putting [the investor] in a situation where [it] had no choice other than to accept the scheme or otherwise risk suffering higher losses”) “not due to unfavourable market conditions or a company’s crisis ... but due to governmental policy and conduct by Argentina.” As such, the Government’s conduct was held to be a compensable breach of the State’s Fair and Equitable Treatment obligation. And so it is in the present case.

787. It will be recalled that, as early as 9 July 2008, Lone Star Chairman [REDACTED] had sent a letter to FSC Chairman K.W. Jun, stating that if FSC misconduct caused financial loss, Lone Star intended to initiate international arbitration against Korea to collect full compensation. As Mr. [REDACTED] stated:

Based on public statements by FSC officials, we understand the FSC's position to be that it will not consider any application by any financial institution to become the major shareholder of KEB while certain legal cases relating to KEB are pending. It is this same position that thwarted LSF-KEB's earlier attempts to sell the shares to other leading financial institutions (Kookmin Bank in 2006 and DBS Bank in early 2007) – the FSC simply refused to consider these institutions' applications to acquire the Shares because legal cases were pending.

*The FSC's stated position has been and continues to be of grave concern to us.*¹⁰⁸²

788. Lone Star's position, as set out in Mr. [REDACTED] letter, foreshadows the Claimants' arguments raised in the present arbitration. He continued:

*Based on advice from Korean counsel, we respectfully believe that these legal cases have no bearing whatsoever on the approval decision pending before the FSC. The FSC's legal responsibility is to pass judgment on the fitness of the applicant. And these cases have nothing to do with the fitness of HSBC as the future major shareholder of KEB. Thus we believe the FSC's position to defer a decision on HSBC's application to hold a substantial interest in KEB until the conclusion of these legal cases is unsupportable. Similarly it is not an appropriate exercise of the FSC's discretion to withhold approval based on public sentiment.*¹⁰⁸³ [emphasis added]

789. On 11 February 2009, Mr. [REDACTED] again wrote to the FSC Chairman, outlining LSF-KEB's case for an investment treaty arbitration.¹⁰⁸⁴
790. Mr. [REDACTED] correspondence in 2008 and 2009, while sent prior to the 2011 BIT coming into force, shows the consistency of Lone Star's position. The Tribunal by majority concludes that LSF-KEB never accepted the 3 December 2011 SPA as being in its

¹⁰⁸² Exhibit R-099, Letter from [REDACTED] to K.W. Jun, 9 July 2008, p. 2.

¹⁰⁸³ Exhibit R-099, Letter from [REDACTED] to K.W. Jun, 9 July 2008, p. 3.

¹⁰⁸⁴ Exhibit C-367, Letter from [REDACTED] to D.S. Chin, 11 February 2009 (quoted above in relevant part at footnote 240).

“commercial interest” except as a step to mitigate its losses in the intended international arbitration.

791. In the result, the Tribunal by majority finds that the Respondent violated its obligation to provide Fair and Equitable Treatment.

XIV. CAUSATION AND APPORTIONMENT OF LIABILITY

792. The Claimants’ position is that the whole of its loss is attributable to the misconduct of the Korean authorities. The Respondent’s first position is that the Claimants’ loss was self-inflicted and Korea is free of any responsibility. However, in the alternative, if the Tribunal were to conclude both that it has jurisdiction and that the Claimants have established a violation by Korea of its international obligations, then, Korea’s “fall back” position is that any potential damages award against Korea should, by virtue of the doctrine of contributory fault, “be eliminated or, at a minimum, reduced in the full amount of Lone Star’s own contribution to its purported injury.”¹⁰⁸⁵

A. CAUSATION IN PRINCIPLE

793. One approach is taken from the Latin maxim “*In jure non remota causa sed proxima spectator*,” which may be translated as “[i]n law, it is not the remote cause but the **near cause** that is looked to.” The “near cause” is sometimes viewed as the last in time, or the last “clear chance” to avoid the loss. On the other hand, the analysis of causation is also formulated in terms of an “efficient” cause, meaning something that is the agency of change. The FSC would have avoided the entire loss had it approved the 8 July 2011 Hana transaction prior to the new SPA signed 3 December 2011. On the other hand, the Respondent says that Lone Star’s criminal misconduct is the “efficient” cause of the loss because even the then President of KEB, ██████████ appointed by Lone Star, acknowledged that in the absence of its criminal conduct the Hana approval would have been given on 16 March 2011 at the scheduled meeting of the FSC.¹⁰⁸⁶ The FSC postponed

¹⁰⁸⁵ Rejoinder, para. 1397, citing Exhibit RA-333, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International: 2008) (excerpt), p. 106 (“In addition, even though the breaching party did in part cause the damage, the injured party too may bear responsibility for the injury in part, and thus contributory fault may reduce or eliminate the claimed compensation”).

¹⁰⁸⁶ Exhibit CWE-003, ██████████ First Witness Statement, para. 26.

approval of the Hana transaction even though the FSC later acknowledged that LSF-KEB's conviction had no logical connection to the suitability of Hana as an eligible purchaser of the control block.¹⁰⁸⁷ Lone Star's conviction was registered on 6 October 2011 when the FSC was already facing increasing pressure from the public and the politicians to bring about a reduction in Lone Star's "eat and run" profits.

794. The doctoral thesis of one of the members of the Tribunal, Professor Brigitte Stern, analyses issues of State responsibility¹⁰⁸⁸ in terms (in part) of issues of causation and the "free act" of the victim in response to the State action:

Supposons qu'à la suite d'un acte illicite, un individu réagisse d'une manière dommageable pour autrui ou pour lui-même. Cet acte de la victime de l'acte illicite ou d'un tiers sera-t-il considéré comme « produit » par l'acte illicite initial ? Il est très rare que dans une hypothèse de ce genre la jurisprudence internationale admette qu'une activité humaine puisse être entièrement déterminée par un acte illicite antérieur. L'intervention de la volonté de l'individu crée – à son détriment – une présomption de liberté. Ainsi le lien de causalité sera-t-il généralement

¹⁰⁸⁷ Exhibit C-274, "Financial Services Commission Orders Lone Star Share Disposal Within Six Months," *FSC Press Release*, 18 November 2011, p. 3:

*The objective of the regulatory regime with respect to the review of major shareholder eligibility and the issuance of share disposition order is to **exclude ineligible parties from becoming major shareholders**. Thus, if an ineligible person is stopped from being a major shareholder of a bank, notwithstanding the lack of specific method for compliance, the objective can be met. [emphasis added]*

¹⁰⁸⁸ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone: 1973), pp. 194-194, 382 (Préface de Paul Reuter):

Determinism and Freedom

*Suppose that as a result of an illegal act, an individual reacts in a manner that is harmful to others or to himself. Will the victim's act or that of a third party be considered "produced" by the original unlawful act? It is very rare that in a situation of this kind, international jurisprudence accepts that human activity can be entirely determined by the prior wrongful act. The intervention of the will of the individual creates – to his detriment – a presumption of freedom. Consequently, **the causal link will generally be considered broken**: it is the cost of freedom over determinism! [unofficial translation] [emphasis added]*

2. The victim's act intervening "after" the act of the State

[...]

*Even if "conditioned" by the wrongful act, the victim's act, as we have already had the opportunity to mention, **appears in the vast majority of cases as a "free" act intervening as an external element**. [unofficial translation] [emphasis added]*

considéré comme rompu : c'est la rançon de la liberté sur le déterminisme ! [emphasis added]

*Même « conditionné » par l'acte illicite, l'acte de la victime, ainsi que nous avons déjà eu l'occasion de le mentionner, apparaît dans l'immense majorité des cas comme un acte « libre » intervenant comme un élément extérieur.*¹⁰⁸⁹ [emphasis added]

The argument is made by the Respondent, accordingly, that in the end, Lone Star willingly agreed to a price reduction in its own commercial interest.

795. In the view of the Tribunal majority in this case, however, the question whether the acquiescence of an investor in State misconduct is a “free act” that breaks the chain of causation is a question of fact. Whether or not the majority of cases examined by Professor Stern concluded on their respective facts that the victim acted freely and in its own interest cannot determine what happened **in fact** in this case. Submission under protest to the misconduct of a regulator in order to mitigate damages to be claimed (as announced) in an international arbitration requires the Tribunal to examine all the circumstances, not simply their sequence.
796. The relevant principle concerning “concurrent causes” is summarised by Professors Ripinsky and Williams and relied on by the Respondent, that: “[i]nternational law also recognises the relevance of contributory fault ... [which] fits within the discussion on ‘**causation**’ and in particular on ‘**concurrent causes**’, as a circumstance reducing the amount of compensation.”¹⁰⁹⁰ Among arbitral tribunals, the authors observed:

The current predominant approach centres on the apportionment of liability for damages between the claimant and the defendant where the claimant's fault has materially added (ie contributed) to the loss or damage sustained by the claimant due to the conduct of the defendant. [...] In sum, arbitral practice demonstrates that tribunals do reduce compensation by taking into account claimant's unreasonable or

¹⁰⁸⁹ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Pedone: 1973), p. 328.

¹⁰⁹⁰ Rejoinder, para. 1392, citing Exhibit RA-097, S. Ripinsky and K. Williams, “Chapter 4: General Approach to Compensation by Cause of Action,” in *Damages in International Investment Law* (British Institute of International and Comparative Law: 2008), p. 314 [emphasis added by this Tribunal].

*imprudent conduct where they consider that the relevant action or omission has contributed to the injury.*¹⁰⁹¹ [emphasis added]

In the present case, the Respondent points out that Lone Star's stock manipulation was not just "unreasonable or imprudent." It was illegal, as constituting a serious financial crime in Korean law and was sanctioned by an ICC tribunal as a violation of Korea's civil law.

797. Ripinsky and Williams recognise that an act by a claimant which contributed to the injury may not amount to contributory fault if the claimant acted under duress. As Ripinsky and Williams write:

*In CME v Czech Republic, the Tribunal considered whether CME itself contributed to the loss of its investment by agreeing in 1996 to give up the initial 1993 licence arrangement (a step that eventually led to the full loss of investment). The Tribunal found that the Media Council forced CME to give up the legal protection for its investment, and that therefore there was no contributory fault that could decrease the amount of compensation. This decision demonstrates, therefore, that duress exercised by the responsible party precludes a finding of contributory fault, even if the claimant's conduct did contribute to the injury.*¹⁰⁹² [emphasis added]

As explained by Professor Jarret, "**signing a contract under duress** is voluntary conduct, although ... the person who signs would not actually be causally responsible for this conduct."¹⁰⁹³

798. With respect to claims of duress by Lone Star in the present case, the Tribunal recalls that in the ICC proceedings brought by Olympus Capital (which were based in part on duress), Lone Star successfully argued that Olympus Capital had not established duress despite its conduct in forcing Olympus Capital by illegal means to sell its KEB stock to Lone Star or face an even greater loss of its investment.

¹⁰⁹¹ Exhibit RA-097, S. Ripinsky and K. Williams, "Chapter 4: General Approach to Compensation by Cause of Action," in *Damages in International Investment Law* (British Institute of International and Comparative Law: 2008), pp. 314, 318-319.

¹⁰⁹² Exhibit RA-097, S. Ripinsky and K. Williams, "Chapter 4: General Approach to Compensation by Cause of Action," in *Damages in International Investment Law* (British Institute of International and Comparative Law: 2008), p. 318.

¹⁰⁹³ M. Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (Cambridge University Press: 2019), p. 54 (available at: https://www.google.com/books/edition/Contributory_Fault_and_Investor_Misconduct/CzGdDwAAQBAJ?hl=en&gbpv=1) [emphasis added].

799. In the present case, the Tribunal also declines to find Lone Star acted under duress. Rather, it proceeded to make the amended SPA under protest on the basis that what it was losing from Hana, it would later collect from the Respondent in this ICSID arbitration. Lone Star was under a duty to mitigate its damages. Had Lone Star refused the price reduction, the FSC showed every indication of continuing to stall approval, in which case Lone Star would have been left without an approved buyer and lost the entire control premium instead of only a portion of it. The Respondent would then likely have argued that LSF-KEB should be barred from recovery by reason of its failure to mitigate its loss.
800. While, according to the majority of the Tribunal, the FSC's conflict of interest resulted in giving priority to its own self-protection over the obligation of its statutory mandate occurred later in time than Lone Star's serious criminal conduct, Lone Star's criminal misconduct exposed LSF-KEB to the orchestration of the price reduction. Lone Star's criminal conduct put a six-month time fuse on LSF-KEB's proprietary interest in KEB shares in excess of ten percent. The USD 433 million loss was caused by a combination of the separate but entangled conduct of both Lone Star and the FSC.
801. Causation is also frequently analysed in terms of "but for." It is argued by the Claimants that their criminal conduct should not be considered an efficient and proximate cause because "but for" the FSC's misconduct, the 8 July 2011 SPA would have closed on time and the loss would not have occurred. Thus, in the Claimants' view, the FSC's misconduct is properly considered the proximate cause of the loss.
802. Equally, the Respondent argues that regardless of the conduct of the FSC, the loss flowed from Lone Star's conviction, which forfeited its right to continue to own shares in excess of 10%. Lone Star was no longer entitled to control and therefore was no longer entitled to a control premium. LSF-KEB had contractual rights against Hana, but the performance of the contract was subject to regulatory approval in a process over which Lone Star exercised no control or, on the facts, had any rights of participation or, for that matter, applied to seek such participation. Counsel for the Respondent advanced this argument at the 15 October 2020 Hearing:

*The critical point from an international law perspective is that the private parties' decision to lock themselves in to a particular price for a particular period of time does not create an obligation on the regulators to approve the transaction within that time period. The private parties' contractually agreed lock-up period does not dictate or control the procedure or timing of the regulator's decision on the transaction.*¹⁰⁹⁴

803. While the criminal conviction did not of itself take away LSF-KEB's proprietary interest in its KEB shares, those proprietary rights were of little benefit in the absence of the FSC's approval of Hana and LSF-KEB had no standing (and never sought standing) in the Hana approval process. As counsel for the Claimants acknowledged at the Hearing:

*In the case of an application for approval like the applications of HSBC and Hana, the Party with the "legal interest" is the applicant, Hana or HSBC. The FSC's approval was to be based on their eligibility and qualifications to own a bank. LSF-KEB had no standing to bring this type of an administrative suit and had no remedy in Korean courts to FSC's delays. It was up to HSBC or Hana to do that.*¹⁰⁹⁵ [emphasis added]

* * * * *

*I can say right away we're not aware of [any] evidence that Lone Star, LSF-KEB, sought to initiate administrative proceedings.*¹⁰⁹⁶ [emphasis added]

The Tribunal's Ruling on Causation

804. The Tribunal by majority concludes that the evidence establishes that "but for" the criminal conviction of LSF-KEB and the concurrent misconduct of the FSC, the Hana transaction would have been approved in a timely way and the loss avoided.
805. In short, in the view of the Tribunal majority, both the FSC and Lone Star contributed directly and materially to the reduced share price.

¹⁰⁹⁴ TD23, 327:4-12.

¹⁰⁹⁵ TD22, 158:17-159:3.

¹⁰⁹⁶ TD22, 171:8-10.

B. APPORTIONMENT IN PRINCIPLE

806. Article 39 of the ILC Articles provides: "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."¹⁰⁹⁷

807. Extracts of the ILC's Commentary to Article 39 include the following:

*Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission.*¹⁰⁹⁸ [emphasis added]

808. As Professor Kantor points out, a claimant's conduct that contributes to the loss may be taken into account both at the liability stage and the quantum stage:

[The United Nations Convention on Contracts for the International Sale of Goods] *Article 80 specifies [...] "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."*

*Although egregious issues such as fraud, misrepresentation, corrupt payments or unlawful conduct on the part of the injured party are usually presented as a defense to liability in the first place, those circumstances may also form the basis for an contributory [sic] fault attack on the amount of damages to be paid by the breaching party. Notably, allegedly unlawful conduct on the part of an investor is an issue that arises repeatedly in investment treaty disputes — in the jurisdiction phase, on the merits and again to determine quantum.*¹⁰⁹⁹

809. The Tribunal has concluded by majority that Korea violated the 2011 BIT by its denial of Fair and Equitable Treatment, but that LSF-KEB, by its criminal misconduct made a material and significant contribution to its loss.

¹⁰⁹⁷ Exhibit CA-029 / RA-002, ILC Articles, Art. 39.

¹⁰⁹⁸ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) (available at:

https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), Art. 39, para. 1.

¹⁰⁹⁹ Exhibit RA-333, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International: 2008), pp. 110-111.

810. What must now be analysed is the causal link between the criminal misconduct of the Claimants and **the loss** ["the prejudice"] the Claimants ultimately suffered by reason of the partial loss of control premium brought about by the FSC's imposition of a price reduction.

C. THE INVESTOR-STATE ARBITRATION AUTHORITIES ON APPORTIONMENT

811. The current Secretary-General of ICSID observed in 2010 that "investment cases have reduced the damages otherwise payable by a percentage intended to reflect the investor's role in the events leading to loss."¹¹⁰⁰

812. Generally, investment cases in which some of the damages are attributed to the claimant can be divided into cases in which the claimant has committed an unlawful act,¹¹⁰¹ and cases in which the claimant is denied damages to the extent it was found to have exercised poor judgment in the process of making its investment, *e.g.*, failed to perform due diligence, simply overpaid for its investment, or otherwise contributed to its investment loss by acting unwisely.¹¹⁰² The cases in which the claimant engaged in some unlawful act are the ones that are relevant here.

813. In *Yukos v. Russia*, in which the claimants had acted unlawfully in certain respects, the tribunal reduced the damages awarded by twenty-five percent after concluding that, "as a result of the material and significant mis-conduct by Claimants and by Yukos (which they

¹¹⁰⁰ Exhibit CA-031, M. Kinnear, "Damages in Investment Treaty Arbitration," in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press: 2010), pp. 565-566; see also Exhibit RA-334, I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press: 2009) (excerpt), pp. 120-121.

¹¹⁰¹ Exhibit CA-742, *Yukos Universal Limited v. Russian Federation*, PCA Case No. AA227, Final Award, 18 July 2014 ("*Yukos v. Russia*") (75 percent of liability for the damages apportioned to the respondent and 25 percent apportioned to the claimant); Exhibit CA-045, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/11, Award, 5 October 2012 ("*Occidental Petroleum v. Ecuador*") (75 percent of liability for the damages apportioned to the respondent and 25 percent apportioned to the claimant); Exhibit RA-330, *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. AA226, Final Award, 18 July 2014.

¹¹⁰² See, *e.g.*, Exhibit CA-042, *MTD v. Chile* (50 percent of liability for the damages apportioned to the respondent and 50 percent apportioned to the claimant); Exhibit RA-119, *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Award, 22 September 2005 ("*Bogdanov v. Moldova*") (50 percent of liability for the damages apportioned to the respondent and 50 percent apportioned to the claimant); Exhibit RA-101, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 345 (finding that "the officers of EIB who conducted the negotiations regarding the purchase of the branch clearly acted unprofessionally and, indeed, carelessly" and that "[t]he responsibility for the result of EIB's conduct, including its omissions, is EIB's alone"); Exhibit CA-004, *Azurix v. Argentina* (reducing award where the claimant had unreasonably overpaid for the concession at issue).

controlled), Claimants have contributed to the extent of 25 percent to **the prejudice** which they suffered as a result of Respondent's destruction of Yukos."¹¹⁰³ The question was whether there was a sufficient causal link between any wilful or negligent act or omission of the claimants and **the loss** ["the prejudice"] the claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos. The tribunal held that the necessary causal link had been established.

814. In the present case, the issue is whether the criminal conduct of Lone Star contributed to **the loss** of a part of the control premium resulting in at least partial responsibility for the "damage" or "prejudice" of which it complains. According to the *Yukos* tribunal, "The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault."¹¹⁰⁴
815. In *Yukos*, the respondent alleged 28 instances of illegal and bad faith misconduct on the part of the claimants, of which the tribunal concluded that four "must be considered as potentially constituting fault that may have contributed to the destruction of Yukos, for which the tribunal has found Respondent responsible."¹¹⁰⁵ These included:
- (a) conduct related to the acquisition of Yukos and subsequent consolidation of control over Yukos and its subsidiaries (e.g., skimming profits of Yukos and its production subsidiaries for their own self-enrichment);
 - (b) conduct related to the Cyprus-Russia Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital of 5 December 1998 (e.g., evading hundreds of millions of dollars in Russian taxes on profits from transactions in and profits from sales of Yukos shares);
 - (c) conduct in connection with the auction of Yukos' subsidiary Yuganskneftgaz (i.e., when its core asset was auctioned off to Rosneft), including procuring a Temporary Restraining Order from a Texas court, and publishing advertisements in, e.g., the

¹¹⁰³ Exhibit CA-742, *Yukos v. Russia*, paras. 1633-1637 [emphasis added].

¹¹⁰⁴ Exhibit CA-742, *Yukos v. Russia*, para. 1600.

¹¹⁰⁵ Exhibit CA-742, *Yukos v. Russia*, para. 1608.

Financial Times, warning prospective purchasers that participating in the auction would bring them “a lifetime of litigation,” which might have depreciated the price obtained at the auction; and

- (d) conduct in connection with its bankruptcy, notably the fact that it did not pay the “A Loan,” which was used as the basis for the petition for bankruptcy against Yukos.¹¹⁰⁶
816. However, the Yukos tribunal found that only the claimants’ conduct concerning (a) and (b) amounted to contributory fault, as the conduct described in (c) above “did not contribute in a material way to its demise,”¹¹⁰⁷ and Yukos would have been faced with other grounds for bankruptcy even if it had paid the “A Loan” in (d) above.¹¹⁰⁸
817. Accordingly, because the shareholders were found to have acted unlawfully in managing the company before it was expropriated by Russia, the damages awarded against Russia were reduced by a factor calculated to match the extent to which the claimants were responsible themselves for the damages to the company.
818. As in the present case, the acts of the claimants were independent of the subsequent wrongful conduct of Russia, but had rendered Yukos vulnerable to its own destruction by Russia and thereby “contributed to the losses:”

*While the Tribunal has concluded, on the basis of the totality of the evidence, that Respondent’s tax assessments and tax collection efforts against Yukos were not aimed primarily at the collection of taxes, but rather at bankrupting Yukos and facilitating the transfer of its assets to the State, it cannot ignore that Yukos’ tax avoidance arrangements in some of the low-tax regions made it possible for Respondent to invoke and rely on that conduct as a justification of its actions against Mr. Khodorkovsky and Yukos.*¹¹⁰⁹

¹¹⁰⁶ Exhibit CA-742, *Yukos v. Russia*, paras. 1608, 1623, 1625, 1630.

¹¹⁰⁷ Exhibit CA-742, *Yukos v. Russia*, para. 1629.

¹¹⁰⁸ Exhibit CA-742, *Yukos v. Russia*, paras. 1631-1632.

¹¹⁰⁹ Exhibit CA-742, *Yukos v. Russia*, para. 1614.

*[T]he Tribunal concludes that there is a sufficient causal link between Yukos' abuse of the system in some of the low-tax regions and its demise which triggers a finding of contributory fault on the part of Yukos.*¹¹¹⁰

819. In the present case, the FSC “invoked and relied upon” the criminal proceedings against Lone Star to delay approval of the Hana transactions, and then, according to the majority of the Tribunal, used the convictions and resulting Compliance and Disposition Orders to orchestrate a share price reduction (which was, as the Chairman of the FSC acknowledged, none of its proper business). The result was to inflict on Lone Star the USD 433 million net price reduction.
820. In *Yukos*, the acts of the claimants, despite being independent of the Russian expropriation, and (as in the current case) prior in time, nevertheless were taken into account in reducing the compensation. As the tribunal stated:

*In the view of the Tribunal, Claimants should pay a price for Yukos' abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia DTA, which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation.*¹¹¹¹ [emphasis added]

821. The “price” in *Yukos* was the reduction of 25% in compensation for the loss:

*Having considered and weighed all the arguments which the Parties have presented to it in respect of this issue the Tribunal, in the exercise of its wide discretion, finds that, as a result of the material and significant misconduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case.*¹¹¹²

The teaching of *Yukos* is that whether certain conduct by a claimant contributed to the loss in a material way is a question of fact to be determined on the evidence before the tribunal, and not on abstract formulae.

¹¹¹⁰ Exhibit CA-742, *Yukos v. Russia*, para. 1615.

¹¹¹¹ Exhibit CA-742, *Yukos v. Russia*, para. 1634.

¹¹¹² Exhibit CA-742, *Yukos v. Russia*, para. 1637.

822. In *Occidental Petroleum v. Ecuador*, there was a falling out between the contracting parties to a participation agreement regarding exploration for and production of hydrocarbon resources. Occidental unquestionably had violated the term of that agreement prohibiting it from assigning any of its rights, whereupon Ecuador issued a “*Caducidad Decree*” which the tribunal found effectively expropriated Occidental of all rights in the agreement and by doing so was a disproportionate response to Occidental’s breach of the agreement. Since Occidental’s own breach of the agreement was the cause of Ecuador’s disproportionate “*Caducidad Decree*,” the tribunal apportioned 25 percent of the resulting damages to Occidental itself.¹¹¹³
823. The claimants in *Occidental Petroleum* argued that “the Respondent’s totally disproportionate reaction (*i.e.*, the *caducidad*) was in breach of the Treaty and international law and must be considered as the sole and exclusive cause of their resulting losses.”¹¹¹⁴ However, in the view of the tribunal:

*The fact that a contractor agrees that caducidad [sic] may be a remedy in certain situations does not mean that the contractor has waived its right to have such a remedy imposed proportionately, or otherwise imposed in accordance with all relevant laws. That is particularly so when, as in the present case, the parties agree that the contract is to be governed by a system of law (Ecuadorian law) which expressly requires the principle of proportionality to be observed. There is nothing in the Participation Contract to indicate an intention to “contract out” of proportionality or any other legal principles of general application.*¹¹¹⁵

824. As in *Yukos*, the *Occidental Petroleum* tribunal stated that “it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault.”¹¹¹⁶
825. In reaching its decision, the *Occidental Petroleum* tribunal relied on the work of its member, Professor Stern (who did not dissent on the principle of apportionment but only

¹¹¹³ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 687.

¹¹¹⁴ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 661.

¹¹¹⁵ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 422.

¹¹¹⁶ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 670.

on the division of responsibility between the claimants and the respondent, her dissent mainly being on an entirely different issue):

Both parties, in support of their respective positions, have quoted extensively to extracts of the 1974 seminal thesis of Professor Brigitte Stern, a member of this Tribunal, entitled "Le préjudice dans la théorie de la responsabilité internationale."¹¹¹⁷

826. In a section entitled « *Acte de la victime justifiant partiellement l'acte de l'État* », Professor Stern refers to the cases of *Delagoa Bay Railway* and *Lillie Kling v. Mexico* as authorities for the following proposition:

Il y a enfin un certain nombre de circonstances dans lesquelles l'acte de la victime ne justifie que partiellement l'acte de l'État et où il faut donc considérer qu'aussi bien l'un que l'autre sont intervenus de façon complémentaire dans la production du dommage.

[Translation: Finally, there are a certain number of circumstances in which the act of the victim only partially justifies the State action, and in which as a result it must be concluded that both the former and the latter operated in a complementary fashion to produce the damage.]¹¹¹⁸ [emphasis added]

827. In the result, the *Occidental Petroleum* tribunal decided that "the Claimants should pay a price for having committed an unlawful act which contributed in a material way to **the prejudice** which they subsequently suffered when the *Caducidad* Decree was issued:"¹¹¹⁹

*In considering the extent of the contribution of the Claimants' negligence to their injury, the Tribunal notes that the issuance of the *Caducidad* Decree which ensued, as the Tribunal has found, was a disproportionate sanction and a measure tantamount to expropriation of the Claimants' substantial investment in Ecuador. The totality of the Claimants' damages were caused by *Caducidad*. **The Tribunal must now determine to what extent and in what proportion the Claimants' unlawful act in 2000 contributed to lessen the responsibility of the Respondent.**¹¹²⁰ [emphasis added]*

828. The *Occidental Petroleum* tribunal, in the exercise of its "wide discretion," found that, as a result of their material and significant wrongful act, the claimants contributed to the

¹¹¹⁷ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 674.

¹¹¹⁸ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 675.

¹¹¹⁹ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 680 [emphasis added].

¹¹²⁰ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 681.

extent of 25% to “the prejudice” which they suffered when the respondent issued the *Caducidad* Decree.¹¹²¹ Professor Stern, in dissent, would have apportioned the loss 50/50 as the Claimants had acted “imprudently and illegally.”¹¹²²

829. In another instance of apportioned fault, the tribunal in *Bogdanov v. Moldova* ordered a 50/50 split because the investor had contributed to his loss not by any wrongful act during the currency of the investment but by failing to properly protect himself in his initial investment contract with Moldova.¹¹²³ As in *Yukos*, the tribunal simply identified on the facts a causal connection between the investor’s conduct and the claimed loss and reduced

¹¹²¹ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 687:

Having considered and weighed all the arguments which the parties have presented to the Tribunal in respect of this issue, in particular the evidence and the authorities traversed in the present chapter, the Tribunal, in the exercise of its wide discretion, finds that, as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered when the Respondent issued the Caducidad Decree. The resulting apportionment of responsibility as between the Claimants and the Respondent, to wit 25% and 75%, is fair and reasonable in the circumstances of the present case.

¹¹²² Exhibit RA-269, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID, ARB/06/11, Dissenting Opinion of Professor Brigitte Stern, 20 September 2012, paras. 7-8. Professor Stern writes:

I consider that the contribution of the Claimants to the damage has been overly underestimated, as the Claimants deliberately took the risk of caducidad by their behaviour – meaning that caducidad could happen or not happen, and there were indeed more chances that it could happen than not, considering the text of the law and the reference to caducidad in the contract. It is interesting to note that in the MTD case both the tribunal and the ad hoc committee have endorsed a 50/50 split on the sole ground that the claimant had acted imprudently from a business point of view though not illegally. Here the split 50/50 would have been even more justified, as the Claimants have acted both very imprudently and illegally. This critique of the majority’s position, however, is not based on an error of law or an excess of power, but on a different appreciation of the factual situation, which is at the discretion of the Tribunal.

As a result of the foregoing, I consider that a fair and reasonable apportionment of responsibility between the Claimants and the Respondent should more appropriately have been a 50/50 split.

¹¹²³ Exhibit RA-119, *Bogdanov v. Republic of Moldova*, Sec. 1.2.1:

Iurii Bogdanov [...], a Russian citizen resident in the Republic of Moldova, established [...] a wholly owned investment company in the Republic of Moldova [...]. On 20 April 1999 [his company] entered into a contract with the Department of Privatization of the Republic of Moldova [...] for the purchase of a majority shareholding in the capital of a company [being privatized].

The respondent State did not transfer the shares as agreed, but the Tribunal deemed Bogdanov’s company “partially responsible for the loss because it did not ensure that the Privatization Contract contained an appropriately precise regulation of the compensation” (Sec. 5.2).

the award by 50%. The fact that in *Bogdanov*, the claimant's contribution to the loss occurred in the investment itself, whereas in *Yukos*, the claimants' contribution to the loss occurred after the investment, was not controlling. What is important in each case is that "the loss ... was unrelated to the wrongdoing of the State,"¹¹²⁴ but nevertheless contributed in a material way to the claimed loss.

830. A 50/50 split was also arrived at in *MTD v. Chile*, where the tribunal attributed a portion of the loss to the "business risk" undertaken by the claimants, which contributed to the losses "for which they bear responsibility, regardless of the treatment given by Chile to the Claimants."¹¹²⁵ Thus:

*The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment on the basis of the following considerations.*¹¹²⁶

831. As in *Bogdanov*, the *MTD* tribunal brought investment errors into account against losses inflicted by the respondent State because on the facts of each case, an appropriate causal connection had been established.
832. On occasion of course, a claimant's conduct has been held to preclude any award of compensation at all because *on the facts, no causal relationship had been established* between the State conduct and the claimed loss. An example is *Biwater Gauff v. Tanzania*, where it was held that

¹¹²⁴ Exhibit CA-742, *Yukos v. Russia*, para. 1604.

¹¹²⁵ Exhibit CA-042, *MTD v. Chile*, para. 242:

2. *Damages Attributable to Business Risk, Residual Value of the Investment*

242. *The Tribunal decided earlier that the Claimants incurred costs that were related to their business judgment irrespective of the breach of fair and equitable treatment under the BIT. As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits. [emphasis added]*

¹¹²⁶ Exhibit CA-042, *MTD v. Chile*, para. 243.

*the actual, proximate or direct causes of the loss and damage for which [the claimant] now seeks compensation were acts and omissions that had already occurred by 12 May 2005. In other words, none of the [respondent's] violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place.*¹¹²⁷

*[I]t follows that each of [the claimant's] claims for damages must be dismissed, and that the only appropriate remedies for the [respondent's] conduct can be declaratory in nature.*¹¹²⁸

833. It is true, of course, that Lone Star had a binding contract dated 8 July 2011 to sell its control block to Hana, but performance of that contract was conditional on FSC approval of Hana in a regulatory process to which Lone Star was not a party. As previously noted, Lone Star never attempted to make itself a party to that proceeding and there is no evidence that Hana took action before the administrative courts to push the FSC to get on with a decision. Lone Star's counsel confirmed that Lone Star had taken no steps to join the approval proceedings before the FSC (for which a procedure existed)¹¹²⁹ and thereafter failed to seek standing to appeal under the *Administrative Litigation Act*¹¹³⁰ the continued inaction of the FSC.¹¹³¹ At that point, Lone Star's position in KEB was "Dead Man

¹¹²⁷ Exhibit CA-006, *Biwater Gauff v. Tanzania*, para. 798

¹¹²⁸ Exhibit CA-006, *Biwater Gauff v. Tanzania*, para. 807.

¹¹²⁹ See Exhibit CA-250, *Administrative Procedures Act*, Art. 2(4), which defines parties to include "direct counter parties of the disposition" and "interested parties who are requested to participate in the administrative procedure by administrative agencies *ex officio* or upon applications" [emphasis added]. See also TD22, 169:20-172:1.

¹¹³⁰ Exhibit CA-574, *Administrative Litigation Act*.

¹¹³¹ TD23, 454:6-455:20 and 457:3-7.

[Mr. Stanimir Alexandrov:] *The Administrative Procedures Act, which is again CA-250, applies to the underlying administrative proceeding before the FSC reviewing and granting or rejecting Hana's or HSBC's application.*

With respect to the appeal [against FSC inaction], what applies is the so-called "Administrative Litigation Act," and that is Exhibit CA-574. Article 2, Paragraph 2 of that Law says that: "The term 'omission'" – which is appealable – "means the failure of an administrative agency to take a certain disposition for a considerable period of time, notwithstanding its legal obligation to do so, against an application of a party." So this is one of the actions or non-actions that can be appealed against.

Then we have Article 4(3) that says: "Appeal or litigation for affirmation of an illegality of an omission means litigation instituted to affirm the illegality of an omission of an administrative agency."

Walking.” Without the approval of a buyer in a process in which Lone Star had no status and had made no application to obtain status, the Hana contract would die a natural death, and take the control premium with it into the grave.

834. The FSC had issued a “No Vote” Order on 25 October 2011, pursuant to Article 16(4) of the *Banking Act*, prohibiting LSF-KEB from exercising voting rights in excess of 10% of its KEB shares.¹¹³²
835. Although the Disposition Order dated 18 November 2011 gave Lone Star until 18 May 2012 to dispose of its shares in excess of 10%, the practical deadline was much earlier as 2012 was an election year and Hana warned Lone Star that the deal needed to be done by the end of 2011.¹¹³³

The Tribunal’s Ruling on the Principle of Apportionment

836. In the view of the Tribunal majority, the Respondent’s various efforts to minimise the FSC misconduct are not persuasive:
- (a) the Respondent argues that the FSC procrastination is explained by the need for additional information requested from time to time through 2011 and early 2012. However, the Respondent also contends that but for the Supreme Court ruling on

And then the key provision, Article 36, the title of which is “Standing to sue for litigation for affirmation of an illegality of an omission,” which is exactly our case, says: “An appeal or litigation for affirmation of the illegality of an omission,” and I quote, “may be instituted only by a person who has made a request for a disposition,” and the text continues. But the point is, only the person that made the initial request for a disposition in this case – the applicant, HSBC or Hana – could appeal any inaction or any omission to act by the FSC in case it didn’t act for a considerable period of time contrary to law.

And I just want to give this more complete answer because I didn’t have the materials handy when you asked the question. So, the conclusion is Lone Star did not have standing to appeal the decision or the non-action by the FSC. [emphasis added]

Lone Star could have perhaps be [sic] included as some sort of a third party, but it was not the party [that] made the request for the disposition and because, again, it was not the Lone Star qualifications that were at issue.

¹¹³² Exhibit C-261, Compliance Order (“Pursuant to Article 16-4(4) of the Bank Act, until Lone Star Fund IV is able to satisfy the Compliance Order, Lone Star Fund shall not exercise its voting rights in regards to shares held in Korea Exchange Bank in excess of 10% of Korea Exchange Bank’s total issued and outstanding shares.”).

¹¹³³ Exhibit R-117, Letter from [REDACTED] to [REDACTED] 11 November 2011.

the Stock Manipulation Case on 10 March 2011, the Hana transaction was scheduled for consideration (and likely approval) at the regular FSC meeting of 16 March 2011.¹¹³⁴ The FSC must therefore have concluded as of March 2011 that it had all the information necessary to deal with the Hana transaction;

- (b) in the view of the Tribunal majority, the expectation in March 2011 that the FSC would properly proceed to approve the Hana transaction was eventually frustrated by the FSC's change of position in the summer and autumn of 2011. This change of position was due to a conflict of interest and resulted in the FSC improperly demanding a reduction in the KEB share price as a condition precedent to allowing the Hana transaction to proceed to completion;
- (c) the fact the FSC was apparently ready to approve the Hana transaction in March 2011 does not excuse its refusal to do so in the fall of 2011. On the contrary, the fact the change of position had nothing to do with Hana's merits as purchaser reinforces the conclusion in the view of the majority, that the operating cause of the delay was the conflict of interest and the FSC's determination to cause a share price reduction.
- (d) the Respondent argues that the two alleged causes of the loss (Lone Star's misconduct and the FSC refusal to make a decision on Hana until the FSC had achieved a price reduction) were not concurrent but sequential, and the last "act" in the chain was Lone Star's acceptance of the price reduction in the 3 December 2011 Third Amended Share Purchase Agreement. This final event, the Respondent says, was a free and independent act by Lone Star in its own commercial self-interest, and thereby broke any chain of causation that might otherwise attribute fault to the FSC. However,
 - (i) the concept of contributory fault does not depend on whether the contributing causes were concurrent or sequential. In the apportionment cases where causation was found and apportionment directed (such as *Yukos*

¹¹³⁴ Counter-Memorial, paras. 314-315.

v. Russia and *Occidental Petroleum v. Ecuador*) the causes were sequential just as in the present case, *i.e.*, the contributory acts of the claimants preceded the wrongful acts and omissions committed by the respondent State;

- (ii) the making of the 3 December 2011 SPA cannot be viewed except in the context of the chain of causation that preceded it. An investor does not forfeit its claim by bending under protest to the will of its regulator while giving clear notice that it intended to pursue reparation in another forum (in this case, international arbitration); and
- (iii) the question of contributory fault does not depend on formalistic listing of the sequence of events and declaring the event last in time to have erased the prior misconduct of the other party. Lone Star's acceptance of the 3 December 2011 SPA cannot be isolated from the misconduct of the FSC that gave rise to it.

837. Some criticism has been raised to the effect that "the decisions of various tribunals show the lack of a clear approach to assessing the conduct of the investor and to apportioning responsibility between the parties involved,"¹¹³⁵ but the review of investor-State awards set out above demonstrates that the apportionment depends on the particular facts. Claims are occasionally entirely disallowed where the claimant was the efficient cause of its own loss (*Biwater Gauff v. Tanzania*¹¹³⁶), or divided 50/50 between the claimant and respondent (*MTD v. Chile*,¹¹³⁷ *Bogdanov v. Moldova*¹¹³⁸ and Professor Stern's dissent in *Occidental Petroleum*), whereas in other cases (*Yukos v. Russia*,¹¹³⁹ *Occidental Petroleum v.*

¹¹³⁵ J.M. Marcoux and A. Bjorklund, "Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration," in 69 *International and Comparative Law Quarterly* (October 2020) (available at: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/foreign-investors-responsibilities-and-contributory-fault-in-investment-arbitration/5E29407E89EDD8F4F3127B8961C0EB61/share/173137a8422acb8c986d406fe6c3f6970dada887>), p. 880.

¹¹³⁶ Exhibit CA-006, *Biwater Gauff v. Tanzania*, paras. 798-800.

¹¹³⁷ Exhibit CA-042, *MTD v. Chile*, para. 243.

¹¹³⁸ Exhibit RA-119, *Bogdanov v. Moldova*, Sec. 5.2.

¹¹³⁹ Exhibit CA-742, *Yukos v. Russia*, paras. 1636-1637.

*Ecuador*¹¹⁴⁰) the tribunal apportioned 25 percent of the fault and damage to the claimant, leaving the balance of responsibility to remain with the respondent.

838. What can be said on the cases with confidence is that the apportionment exercise is highly contextual and fact specific.

D. THE TRIBUNAL MAJORITY'S APPORTIONMENT OF RESPONSIBILITY

839. In the view of the Tribunal majority, there was a single indivisible loss to which both the Claimants and the Respondent made a material contribution. The loss cannot be broken down into individually distinct elements that could be assigned exclusively to Lone Star or the FSC. Lacking any such logical division, the entire amount must simply be apportioned.

(1) "But For" Lone Star's Criminal Misconduct the Hana Purchase might have been Approved by the FSC as Scheduled at its Meeting on 16 March 2011

840. While the Claimants now argue that the stock price manipulation conviction was irrelevant except as a thin pretext to cover the FSC's real agenda of saving face before the Korean public and politicians, this self-exoneration is contradicted in the view of the Tribunal majority by the testimony of the then President of the KEB, put in place by LSF-KEB, Mr. [REDACTED] who testified that:

- (a) the FSC was expected "by everyone else involved" to approve the Hana share purchase on 16 March 2011; and
- (b) the fact it did not do so was the result of the Supreme Court decision of 10 March 2011 in the Stock Manipulation Case.¹¹⁴¹

¹¹⁴⁰ Exhibit CA-045, *Occidental Petroleum v. Ecuador*, para. 687.

¹¹⁴¹ Exhibit CWE-003, [REDACTED] First Witness Statement, para. 26:

Around the same time [9 March 2011], the FSC signaled its intent to approve Hana's application by putting it on the agenda of an upcoming meeting on March 16. It was my understanding, shared by everyone else involved, that putting the issue on the agenda reflected the regulators' intention to approve the application. (If the FSC intends to deny an application, they communicate that to the applicant, and the applicant withdraws their application rather than losing face with a direct negative decision.) [emphasis added]

841. Mr. [REDACTED] testified that the FSC's "long-standing pretext [for delay] – that Lone Star was the subject of ongoing [criminal] investigations – was at that point very weak."¹¹⁴² The Supreme Court decision re-energized the FSC's drive for a politically acceptable outcome and, in the view of the Tribunal majority, enabled the FSC's strategy of delay for another ten months until it had imposed a price reduction. The misconduct of Lone Star and the misconduct of the FSC were thus joint operating causes of the \$433 million loss.
842. The FSC concern about the political impact of Lone Star's criminality was recorded in an internal FSC memorandum dated April 2011:

*If the approval of the sale of KEB is granted while there remain questions about Lone Star's eligibility as a large shareholder of KEB, a possible final and conclusive court decision to find Lone Star guilty in the future is expected to provoke criticisms against the government's policy decision.*¹¹⁴³ [emphasis added]

843. Lone Star's criminal conviction led inexorably through a fixed statutory procedure to loss of eligibility to continue to own more than 10% of KEB shares beyond 18 May 2012.
844. The Tribunal majority therefore concludes that "but for" the criminal conviction, Lone Star would not have been in the position of jeopardy that led to its financial loss and that the criminal conviction was a direct and material cause (but not the only contributing cause) of that loss.
- (2) **"But For" the FSC's Intransigence, the Hana Transaction would have been Approved at the 8 July 2011 Price of KRW 13,390 per Share**

845. The Claimants' complaint against the FSC was put forward by counsel as follows:

¹¹⁴² Exhibit CWE-003, [REDACTED] First Witness Statement, para. 26:

Moreover, the FSC's longstanding pretext—that Lone Star was the subject of ongoing investigations—was at that point very weak, because the former bank and government officials who had been charged with wrongdoing in connection with Lone Star's investment in KEB had all been acquitted, and [REDACTED] LSF-KEB, and KEB had been acquitted of the charges against them relating to KEB's rescue of KEB Card. Consequently, the FSC finally seemed prepared to act on Hana's application, notwithstanding these still lurking allegations (which, in any event, had nothing to do with Hana itself).

¹¹⁴³ Exhibit C-764, FSC and FSS, Examination Related to the Lone Star's Sale of KEB, April 2011, p. 5.

We accept the general proposition that administrative agencies do not have to close their eyes to public opinion, but that does not give the regulator a license to act arbitrarily or to act contrary to or in excess of its legal mandate.¹¹⁴⁴

846. In the view of the Tribunal majority, the Respondent's attempt at self-exoneration is unconvincing. Korea argues that one reason for the delay was the FSC's need for additional information which it sought from time to time through 2011 and early 2012. The process, it says, could not be completed without such information. However, as the FSC had concluded as of March 2011 that it had all the information necessary to approve the Hana transaction, and there being no evidence that Hana became less worthy of approval as 2011 progressed towards 2012, the majority concludes that the FSC stalled the approval process to reduce Lone Star's profit and thereby protect itself from its critics.
847. The Respondent points out that the last "act" in the chain of causation was Lone Star's acceptance of the price reduction on 3 December 2011. This, it says, was a free and independent act by Lone Star in its own commercial self-interest, and thereby broke any chain of causation that might otherwise attribute fault to the FSC. However, in the view of the Tribunal majority, the last event in the chain does not necessarily bear full responsibility for the loss. Causation is context sensitive and fact specific. Lone Star's acceptance of the 3 December 2011 SPA cannot be isolated from the misconduct of the FSC that gave rise to it nor its obligation to mitigate the loss it intended to claim in this arbitration.

(3) The Misconduct of Lone Star Enabled the Misconduct of the FSC and Together they Caused the Wrongful USD 433 Million Price Reduction

848. Despite the obligation of the FSC to deal properly with the Hana application, its Commissioners were acutely aware of their institutional self-interest in avoiding the wrath of politicians, the public, the BAI and the unions. According to a majority of the Tribunal, the FSC, enabled by the criminal misconduct of Lone Star, chose the path of self-interest over proper performance of its statutory mandate.

¹¹⁴⁴ TD23, 342:8-13.

849. In light of the differing views of our dissenting member, the majority will set out the chronology of events on which the majority conclusion stands. Unfortunately, this task will involve some repetition of evidence already set out.

a. *15 March 2011*

850. Hana Chairman ██████ met with FSC Chairman S.D. Kim shortly after the release of the Supreme Court Decision. The Hana Chairman told the ICC tribunal that the FSC Chairman had acknowledged to him that the “FSC was under a lot of political pressure” with respect to the Hana approval application.

851. In his Second Witness Statement in this proceeding, Hana Chairman ██████ attributed the pressure to “my personal belief” or “personal speculation” as follows:

I understand that Lone Star has pointed to the transcript of the Honolulu meeting as evidence that as of March 2011, the regulators had communicated a “message” to me that they could approve our application, but in order to do so they would need some sort of assistance, such as a revision to the price terms of the SPA. However, I think Lone Star has misunderstood what Hana was conveying in that meeting. As I have explained in my first witness statement (“First Statement”), there were pressures from civic groups and politicians regarding the sale of KEB. It was my personal belief that we might improve the chances of winning regulatory approval by relieving that pressure, and that appearing to have lowered Lone Star’s returns on the sale, even if only in a superficial way, might be an effective way to accomplish that. This was my personal speculation, based on my observation of the political scene at the time. This was not, however, a message that ever was conveyed to me by the regulators.

We may have engaged in some bluffing and exaggeration in the way we described the situation to Lone Star (for example, by suggesting that I was in daily communication with the FSC Chairman), but in my experience this was well within the norm for a business negotiation between highly skilled investment bankers regarding a high-stakes transaction.¹¹⁴⁵ [emphasis added]

¹¹⁴⁵ ██████ Second Witness Statement, paras. 5-6.

See also TD6, 1629:22-1630:10 (Testimony of Mr. ██████)

As I mentioned, I teach M&A in university, and I believe M&A, it can be thought of as a game of a sort, and so when I talk to my students, I always emphasize that M&A is a sort of a game that they should – maybe that may not be the most appropriate notion, but I try to compare to a poker game, meaning trying to mean

The evidence of FSC Chairman S.D. Kim was to the same effect.¹¹⁴⁶

852. However, in testimony to the tribunal in the ICC Arbitration, Hana Chairman ██████ made it clear that the need to “lower” Lone Star’s returns on the sale was more than a “personal belief” or “speculation” and in fact reflected what he had been told by the FSC Chairman. According to Hana Chairman ██████

Hana’s view was that the issue of Lone Star’s disqualification was separate from Hana’s Application, not least because Lone Star had not yet been convicted [as of March 15]. I tried to convince the FSC Chairman to take the same view. During my meeting with the FSC Chairman, he indicated that the FSC was undertaking a legal review of the situation and that the final decision on Hana’s Application was for the FSC to make, which it would do in due course. The FSC Chairman mentioned that the FSC was under a lot of public and political pressure at the time. However, it was clear to me that if the pressure were to be reduced then he would not be opposed to working toward finalizing the approval of the transaction. Hence I inferred from our conversation that he would need the Parties’ help in overcoming the hurdles he faced. However, the FSC Chairman did not suggest – and I did not think it appropriate to ask – what the Parties could do in this regard.¹¹⁴⁷ [emphasis added]

853. The Hana Chairman and the FSC Chairman were old friends. They were sophisticated in dealing with the Government at the highest levels. In the view of the Tribunal majority, the FSC Chairman communicated without ambiguity that approval required a price

by that comparison that if it’s not with malicious intent, that when it comes to negotiating deals, bluffing is tolerable to a certain extent, but cheating can never be tolerated, and it’s a crime, is what I teach to my students.

¹¹⁴⁶ S.D. Kim Second Witness Statement, para. 20:

The second meeting was on March 15, 2011. This was a few days after the Korean Supreme Court had issued its decision reversing the acquittal of KEB and Lone Star on stock price manipulation charges and remanding the case to the appellate court for further proceedings. Mr. ██████ asked for the meeting to inquire about the impact that the Supreme Court’s decision might have on Hana’s application to acquire KEB. My calendar was already quite full, so my assistant scheduled the meeting with Mr. ██████ in between two previously-scheduled appointments on March 15. The meeting with Mr. ██████ began at 2:40 pm and could not have lasted more than 10 or 15 minutes, because I had another appointment with a former high-ranking official in the Ministry of Finance beginning at 3 pm. I conveyed to Mr. ██████ the FSC’s basic position at the time, which was that the application would be decided according to law and principle, and that the ultimate decision was for the Commission to make. I would not have been in a position to say more than this because whether to give final approval for acquisition could only be decided by the Commission.

¹¹⁴⁷ Exhibit C-949, ICC Award, para. 92.

reduction because nothing but a price reduction could alleviate the FSC Chairman's anxiety about the potential political impact approval could have on his organisation. None of the other terms of the Hana transaction were controversial. The public and political uproar was about price and levels of profit obtained by an "Eat and Run" investor with a "Cheat and Run" criminal record in Korea.

854. The Respondent seeks to attribute the responsibility for the price reduction to Hana. However, the positions of Hana and the FSC were not in total alignment. While the FSC was faced with a political problem, Hana was conscious of its contractual best-efforts obligation under the SPA. Hana was willing to close the sale at the negotiated 8 July 2011 purchase price of KRW 13,390 because it was contractually bound to do so and because in Hana's view the collapse of the purchase would have serious financial and reputational risks for it.¹¹⁴⁸
855. During the ICC Arbitration, Hana listed the possible indirect damage as deterioration of reputation, withdrawal of deposits, downgrade of credit rating, and increased cost of capital. Hana opined that the "failure to close the deal" could "cause instability of domestic financial markets and industry" and lead to the possibility of Lone Star "filing international lawsuit responding to its third failure to close the deal."¹¹⁴⁹
856. Of course, closing the deal at a reduced price was greatly in Hana's commercial interest. Hana thereby avoided the anticipated bad consequences of a failed transaction while reaping a USD 433 million windfall. However, Hana could have lived with the 8 July 2011 price. The FSC could not.

¹¹⁴⁸ Exhibit C-949, ICC Award, para. 88. An internal Hana memo dated 10 March 2011 entitled "*Lone Star's Eligibility as Major Shareholder and Approval for HFG's Inclusion into Subsidiary*" suggested there would likely be significant negative effects upon Hana and the national economy in the event that the FSC were to withhold its approval:

Share price [of Hana] could plummet below the market price prior to the execution of agreement with Lone Star due to extinguished expectation that corporate value would increase after acquisition of KEB and burden of volumes due to paid-in capital increase, etc.

¹¹⁴⁹ Exhibit C-949, ICC Award, para. 88; as summarised by counsel for the Respondent at the Hearing (TD23, 298:18-299:16).

b. 29 March 2011

857. Mr. [REDACTED] told Mr. [REDACTED] in a surreptitiously recorded conversation that there was a “kind of [...] request of FSC in terms of assisting FSC to have [a] kind of excuse. Or way out to approve this transaction. They haven’t exactly mentioned what amendments to us” [emphasis added].¹¹⁵⁰ The FSC, Mr. [REDACTED] suggested, would like to show the public that Hana received a KRW 300 per share reduction. When Mr. [REDACTED] asked if the FSC said that, Mr. [REDACTED] stated that they had not, but said “they kind of indirectly gave [an] impression.”¹¹⁵¹ Mr. [REDACTED] reticence to attribute the request directly to the FSC Chairman

¹¹⁵⁰ Exhibit C-479, Honolulu Meeting Transcript, p. 10.

¹¹⁵¹ Exhibit C-479, Honolulu Meeting Transcript, p. 14. See also pp. 4, 10-11, 14-15, 18-19 [emphasis added]:

[REDACTED] *Uh, and the message deli- delivered to our Chairman [REDACTED] is, from him [the FSC Chairman] is, he is, he is really willing to do something to approve this transaction. But he also in need of, in a sense, assistance or help from us, uh, to wisely overcome the hurdles that he is facing with, especially related to public blame, or political blame that he might come up with when he approved this deal. So I believe that he is really willing to do something for us, but at the same time, we – if there is anything that we can help him to go through the whole, you know, task that we have to do something from him, too. So, that’s the kind of situation.*

[REDACTED] *So, I think- I think, you know, the arguments that you just made, are the arguments we already made to FSC. But that’s a kind of [...] request of FSC in terms of assisting FSC to have kind of excuse. Or way out to approve this transaction. They haven’t exactly mentioned what amendments to us.*

[REDACTED] *So, but just to understand how specific they were, they- they said if we take option three, we need an amendment that punishes Lone Star? Or...*

[REDACTED] *So...*

[REDACTED] *How do they [i.e., the FSC] justify that? How did they say it?*

[REDACTED] *My sense is, at least they can, they would like to say the terms are in favor [...] to Lone Star, because of [...] the force sale. So the terms became unfavorable to Lone Star because of the force sale which I think, I presume, implies some adjustment of price. I don’t think they are talking about like 100 million, 200 million, but rather symbolic. But again [...] this option is not [...] most desirable option. We don’t like this option. We would like to be more objective and more rational option which is number one. Or number two and separate approval option.*

[REDACTED] *Uh, if that was the real punishment, they may strongly request the huge, huge reduction of the purchase price. But what they gave impression to us is not that one. But rather they kind of indirectly gave impression that there may be some mechanism we can both utilize to make the deal to be changed superficially and therefore they can say that even though we order whole sale, we didn’t approve the original SPA but rather changed SPA.*

should be understood in light of Hana's explanation to Mr. [REDACTED] that the FSC did not wish to be identified as the source of the drive for a lower price. Interestingly, Mr. [REDACTED] [REDACTED] also received notice of the FSC's position through Hana's law firm.¹¹⁵²

858. Mr. [REDACTED] explicitly linked the FSC strategy on price reduction to the "forced sale" of the LSF-KEB controlling interest:

[REDACTED] *How do they [i.e., the FSC] justify that? How did they say it?*

[REDACTED] *My sense is, at least they can, they would like to say the terms are in favor [...] to Lone Star, because of [...] the force[d] sale. So the terms became unfavorable to Lone Star because of the force[d] sale which I think, I presume, implies some adjustment of price. I don't think they are talking about like 100 million, 200 million, but rather symbolic.¹¹⁵³ [emphasis added]*

If, as Mr. [REDACTED] said, the people at the FSC "are talking" to Hana about the "adjustment of price," then their communication to Hana was explicit, and, coming from Hana's regulator, would be disregarded by Hana and Lone Star at their peril.

c. *By May 2011, the Public and Media were Putting Increased Pressure on the FSC*

859. A taste of the level of pressure was recorded in the *JoongAng Daily* of 14 May 2011:

In fact, [FSC Chairman] SD Kim has been in the corner since March, when the Supreme Court of Korea annulled and returned the ruling on the case of stock manipulation of KEBCS by Lone Star to Seoul High Court for reconsideration.

[REDACTED] *But the additional 100 won is not in proportion to the dates. It's one month, one month. So what I thought is if the deal is being closed within the month of April, we can deliberately, deliberately close the deal in the month of May for example. Then 200 won, we can say we saved 200 won.*

And plus price reduction of 100 won which is a real reduction if, if we agree. Then we can say to the public that 300 won. I think that magnitude can justify FSC's decision to approve our transaction. That's our feeling based on our internal discussion.

[REDACTED] *But they said that?*

[REDACTED] *No, they didn't say that. They didn't say that. But once they pointed that we Hana can take advantage of the additional consideration to make the change as real change even though it is not economically at least FSC can approve the transaction superficially with lower consideration.*

¹¹⁵² TD7, 1827:17-22 ("However, I didn't hear it directly. I heard it through our legal counsel, law firm").

¹¹⁵³ Exhibit C-479, Honolulu Meeting Transcript, p. 10.

The biggest pressure came from the National Assembly. The minority party members of the National Policy Committee warned, "if the Financial Services Commission allows Lone Star to get away with unreasonably high profits without any penalty, the National Assembly will hold a hearing to hold the FSC to account, and request an audit on the FSC to the Board of Audit and Inspection of Korea and file a complaint with the prosecution." The members of the majority party, who SD Kim expected to defend him from the offensive of the minority parties, just stood by, and some of them even sided with the minority parties. Chung Wa Dae consistently distanced itself from the issue, emphasizing its "non-intervention principle."

*SD Kim's allies continued to decrease within the government. An increasing number of government officials began to express their concern, "this issue could be a 'gate' in the last phase of the administration. ..."*¹¹⁵⁴

860. The report concludes:

*" ... The FSC would completely lose its authority and power if it is concurrently attacked by the National Assembly, Board of Audit and Inspection of Korea, and the Prosecution."*¹¹⁵⁵

In the view of the Tribunal majority, it was the combined pressure of critics in the National Assembly and the BAI as well, possibly, of the threat of prosecution, which motivated the FSC to force a price reduction.

d. Hana was a Willing Emissary in the FSC's Attempt to Reduce the Share Price

861. In the view of the Tribunal majority, there is no doubt Hana was seeking to profit from Lone Star's dilemma. By September 2011, there were press reports in which Hana officials were quoted as having said that Hana was planning to renegotiate the price of its deal with Lone Star in light of the recent fall in the KEB share price and Lone Star's likely conviction for stock price manipulation.¹¹⁵⁶

¹¹⁵⁴ Exhibit C-243, "Seok-Dong Kim raises the white flag to 'Yang-ho [Byeon] Syndrome,'" *JoongAng Daily*, 14 May 2011.

¹¹⁵⁵ Exhibit C-243, "Seok-Dong Kim raises the white flag to 'Yang-ho [Byeon] Syndrome,'" *JoongAng Daily*, 14 May 2011.

¹¹⁵⁶ Exhibit R-302, "Hana's Under-the-table Work For Korea Exchange Bank Acquisition in Full Action," *Herald Economy News*, 7 September 2011; Exhibit R-303, "Seung Yu Kim, 'Korea Exchange Bank Purchase Price Is Variable,'" *Hankook Economy News*, 28 September 2011; Exhibit R-304, "Chairman Seung-Yu Kim, Hints Possible Renegotiation of Korea Exchange Bank Purchase Price," *E-Today*, 28 September 2011.

862. In the initial SPA, Hana was to pay a 16% control premium. As the KEB share value declined over the ensuing months, the share premium (as a percentage of the open market share price) grew proportionally to what critics protested was between 50 and 85%. Hana was locked into an increasingly disproportionate premium but was obliged to use its best efforts to obtain regulatory approval or face contractual penalties. The Hana Chairman sought to portray the price reduction as attributable to his brinkmanship and negotiating skills.¹¹⁵⁷
863. In the view of the Tribunal majority, the Hana Chairman's after-the-fact presentation of his strategy as brinkmanship is not consistent with the financial and reputational risk to Hana if the transaction failed. In Lone Star's ICC Arbitration against Hana, Lone Star's witnesses testified that Hana on its own could not present a negotiating threat because Hana needed to close the transaction as much as did Lone Star.¹¹⁵⁸ Mr. [REDACTED] ICC Arbitration evidence-in-direct was as follows:

Q. At that time, were you concerned that if Lone Star had not agreed to amend the SPA and reduce the price, Hana would have walked away from the deal after the lock-up period expired on November 30th?

A. No, I wasn't. I knew how important this deal was to Hana. Chairman [REDACTED] had told me several times that this was transformative for Hana Bank, and this was going to be the last deal that he did in a long line of M&A transactions. He had told us numerous times that he was prepared to close the bank at the original price. And, of course, Hana had committed to their investors. They'd issued debt. They'd issued equity. And so I was quite confident that they wanted to close this deal.¹¹⁵⁹

¹¹⁵⁷ [REDACTED] First Witness Statement, paras. 15-16. Thus, according to Hana Chairman [REDACTED]

It is a universal truth that a purchaser will try to use the circumstances to its advantage to bargain the sale price downward; in the same way, a seller will try to use the circumstances to its advantage to do exactly the opposite. In this case, the world economy and market index were working in favor of the acquirer, Hana. Without any pressure from the FSC, Hana intended to renegotiate the price downward, and it did. I initially proposed a one-billion dollar price reduction, and ultimately was successful in a 500 million dollar discount. Various players voiced their opinion on this high profile transaction, and Hana used those circumstances to its advantage in laying out the context for its request for a price reduction. [emphasis added]

¹¹⁵⁸ Exhibit C-949, ICC Award, para. 250.

¹¹⁵⁹ Exhibit C-949, ICC Award, para. 250.

864. In the same ICC Arbitration hearing, Mr. [REDACTED] testified, "I wasn't worried about Hana. We weren't even considering that they would walk away. They'd raised money in the capital markets."¹¹⁶⁰

865. In the view of the Tribunal majority, Hana's conduct was opportunistic. It was not the moving force. It capitalised on a situation created by Lone Star's conviction and the FSC's pursuit of its own institutional agenda of self-protection against its public and political critics.

e. October 2011 – The FSC Post-Conviction Deferral Continued Even After Lone Star Abandoned its Right of Appeal

866. When the alleged "legal uncertainty" ended with the 6 October 2011 conviction and Lone Star's decision not to appeal announced on 12 October 2011, the FSC did not advance Hana's application. Instead, as the Tribunal majority finds, the FSC made it clear that the purchase price would have to be reduced if the FSC was to approve its application. It was only after the FSC received Hana's report on 14 November 2011, spelling out that it was renegotiating the price with Lone Star, that the FSC requested Hana to submit a new application and issued the 18 November 2011 Disposition Order without a market sale condition.¹¹⁶¹

¹¹⁶⁰ Exhibit C-949, ICC Award, para. 251. In addition, as early as March 2011 Mr. [REDACTED] (of Hana) had expressed Hana's concern that the deal would close; see Exhibit C-479, Honolulu Meeting Transcript, p. 3:

[REDACTED] *You know, as, as you [INDISCERNIBLE] probably one of the most desperate persons for this deal, and ah, because, you know, I am the very one who secured all the money, myself [...] in Korean won, debt financing – I did it. I did also the difficult 1.3 trillion won of equity financing myself. There are 36 investors secured, and uh, real headache if this deal does not go through. I don't know what to do myself. So I'm really desperate. Uh, I'm really upset with FSC these days, but uh, that's, you know the very unique characteristics of the government officials. So there are difficulties to deal with them. But Chairman [REDACTED] and I am exerting our best effort. Our Chairman [REDACTED] as far as I understand, he, at least talk to the Chairman of FSC almost every day.*
[emphasis added]

¹¹⁶¹ Exhibit C-271, Hana's Report on KEB SPA Status; Exhibit R-119, FSC, (Summary) Processing of Hana Financial Group, Inc.'s Application for Approval of acquisition of KEB as Subsidiary, p. 6; Exhibit C-810, Minutes of 18 November 2011 12th Non-Regular Meeting of FSC; Exhibit C-277, FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price,'" *Hankook Ilbo*, 18 November 2011. Notably, there is also evidence in the record which suggests that the FSC, even before it issued its Disposition Order of 18 November 2011 (and even before 13 October 2011 when it became legally able to issue a disposition order)

f. 28 October 2011

867. On 28 October 2011, Hana Chairman [REDACTED] wrote a further letter to Lone Star advising that the FSC would not proceed with Hana's application without a price reduction.

*Despite an increasing demand for a punitive sale order, Hana has persuaded FSC that such an order would not be applicable in this situation. But, even if a normal sale order is made by FSC, we are required to submit a new contract, as the existing contract was not entered in accordance with the sale order. In submitting a new contract, we should find a way to alleviate political pressure on FSC in approving the transaction, especially by reflecting market valuation and turbulent financial industry. Otherwise, FSC can not be expected to proceed to an approval with the existing contract.*¹¹⁶² [emphasis added]

It is significant that the Hana Chairman refers to "political pressure" as the motive for a price reduction despite his reference to the broader context of "market valuation and turbulent financial industry."

868. The same day, Mr. [REDACTED] alleges (and Mr. [REDACTED] denies) that he was told by Mr. [REDACTED] that:

*During our call on October 28, [REDACTED] explained that the FSC had asked Hana Chairman [REDACTED] to approach Lone Star to reduce the contract price, and that the FSC officials knew that they should approve the deal, but they did not want to be criticized for allowing LSF-KEB to make too much profit.*¹¹⁶³ [emphasis added]

869. Mr. [REDACTED] then reports another call from Mr. [REDACTED] "this morning:"

Guys, I had another talk with [REDACTED] of Hana Bank this morning. He didn't have any different information than yesterday. He reiterated that the [FSC] was pushing them to reduce the price. He said that Hana was happy that it was a good price and is anxious to close the deal as it

refused to approve the sale of KEB without some form of political cover. Hana's original application had been pending since 13 December 2010, but the FSC was including extraneous political considerations in its internal documents well before the 6 October 2011 conviction (*see, e.g., Exhibit C-581*, FSC, Hana Financial Group's Acquisition of KEB, April 2011; *Exhibit C-764*, FSC and FSS, Examination Related to the Lone Star's Sale of KEB, April 2011).

¹¹⁶² *Exhibit C-262*, Email from [REDACTED] to [REDACTED] 28 October 2011.

¹¹⁶³ *Exhibit CWE-023*, [REDACTED] Second Witness Statement, para. 23.

*is, and their request for a reduction is only because of the [FSC] demands. I'll let you know if I hear anything else.*¹¹⁶⁴ [emphasis added]

and then a further call "last night:"

*Guys, [REDACTED] from Hana Bank called me last night. He repeated what he said last time: that the FSC was pressuring them to renegotiate a lower price to "give them an excuse" to approve the deal. I, of course, told them that the sale order should be excuse enough. Nothing different from last time.*¹¹⁶⁵ [emphasis added]

g. The FSC Uses Hana to Communicate its Conditions for Approval to Lone Star

870. It was during these calls, according to Mr. [REDACTED] that Mr. [REDACTED] explained that the FSC did not want to be exposed as pushing for a price reduction because it was improper and outside the FSC mandate. Mr. [REDACTED] testified as follows:

*I told [REDACTED] that, rather than going through the purchaser, the FSC should have made this request to LSF-KEB directly. [REDACTED] responded to me, however, that the FSC could not make that demand directly because it was not within the FSC's scope of authority to set a price for the sale. According to [REDACTED] the FSC chose to make its demand through Hana, and only verbally, because it knew that any pressure by the regulator to reduce the contract price was improper.*¹¹⁶⁶ [emphasis added]

871. Mr. [REDACTED] e-mail to Mr. [REDACTED] of 28 October 2011 supports his Witness Statement:

*I told him that the FSA [sic] should request this directly to us rather than going through Hana. He said that the FSA [sic] could not propose this to us since the request is improper because it is not within their scope to set the price. He said that is why they are doing it through Hana verbally rather than in writing.*¹¹⁶⁷ [emphasis added]

h. The FSC Uses the Media to Communicate its Conditions for Approval to Lone Star

872. Despite FSC Chairman Kim's pronouncement to the National Assembly on 7 October 2011 that the FSC did not involve itself in private contractual arrangements, various FSC

¹¹⁶⁴ Exhibit C-264, Email from [REDACTED] to [REDACTED] and [REDACTED] 29 October 2011.

¹¹⁶⁵ Exhibit C-267, Email from [REDACTED] to [REDACTED] and [REDACTED] 1 November 2011.

¹¹⁶⁶ Exhibit CWE-023, [REDACTED] Second Witness Statement, para. 23.

¹¹⁶⁷ Exhibit C-263, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011.

spokesmen (including an FSC Commissioner) took to the media to make it clear that a reduced share price would have to factor into any approval:

- (a) one **FSC Commissioner** stated that “once a new application is submitted ... the financial soundness of HFG will be reviewed and the **price will be a factor**,”¹¹⁶⁸
- (b) *Hankook Ilbo* also reported that the FSC’s recommendation that Hana submit a new application “can be interpreted as a message to ‘**lower the purchase price**.’” It quoted a “**high-ranking FSC official**” as stating that “the current agreement (KRW 4.4059 trillion) is **too high**,” continuing that the FSC would “wait and see, as Hana Financial Group said that they would **lower the price**,”¹¹⁶⁹
- (c) *The Korea Times* stated:

*The FSC’s ruling [requiring a new Hana application] is widely interpreted as a call for both Hana and Lone Star to **lower the aggregate sale price of about 4.41 trillion won**;*¹¹⁷⁰ [emphasis added] and

- (d) *Yonhap Infomax* reported:

The FSC is pressuring HFG to reduce the purchase price by having HFG reapply for approval to acquire KEB as a subsidiary, the original application of which was previously submitted.

873. The FSC essentially alluded that they would not approve the acquisition of subsidiary if there was the risk that acquiring KEB would harm HFG’s financial soundness. As such, in actuality, it is interpreted that the FSC is requiring HFG and Lone Star **to reduce the purchase price** for KEB. (Emphasis added) While the “financial soundness” of Hana was a legitimate concern of the FSC, the *Yonhap Infomax* analysis reported that concern about “soundness” was a pretext:

¹¹⁶⁸ Exhibit C-278 / R-511, “FSC, Pressure on Hana Financial and Lone Star to Reduce Price,” *Yonhap Infomax*, 21 November 2011 [emphasis added].

¹¹⁶⁹ Exhibit C-277, “FSC opened a ‘safe exit out’ for Lone Star while sending a message to Hana Financial Group to ‘lower the purchase price,’” *Hankook Ilbo*, 18 November 2011 [emphasis added].

¹¹⁷⁰ Exhibit C-811, “Lone Star to lower KEB Price,” *The Korea Times*, 21 November 2011.

A member of the bank circles interpret [sic] that "the FSC is indirectly using the soundness of HFG's financials as a way to place pressure on HFG and Lone Star to lower the purchase price for KEB."¹¹⁷¹ [emphasis added]

The suggestion that the FSC was using the pretext of a concern about the impact the acquisition cost to camouflage the true (improper) FSC purpose is consistent with the rest of the evidence, in the view of the Tribunal majority.

874. While the weight that may be given to press reporting is variable, the numerous articles over a period of time quoting numerous FSC sources on the same theme provide persuasive corroboration of the Claimants' argument that the FSC was clearly communicating to Lone Star the necessity of a price reduction not only through Hana but was relaying this message through the media as well.

i. 11 November 2011

875. Mr. [REDACTED] was again secretly recorded by Lone Star indicating that the FSC was pushing for a price reduction to KRW 11,900:

[REDACTED] *So tell me again. What is it about this [11,900] number...*

[REDACTED] *This number.*

[REDACTED] *He makes [Hana] Chairman [REDACTED] he must have had the discussion with [FSC Chairman] Kim [indiscernible]*

[REDACTED] *I believe so. But I don't think he explicitly talked over this specific number with him. 'Cause that's probably the area that the regulators may like to avoid. Because the price, right?*

[REDACTED] *Because it...but it's illegal for them to even be having this discussion.*

[REDACTED] *They will find other excuses if they think that...you know, if really, the price is the heart of the matters, then I think not the price. They [the FSC] will find other excuses for them to have to delay the approval process. I am sure about that because that's what they did twice in March. So...*

¹¹⁷¹ Exhibit C-278 / R-511, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011.

██████████ *And what's important? The headline number, the price per share – that's what important?*

██████████ *Yeah. So, the rationale that we can think of with this number is, not seventy percent premium, but fifty percent over current market price.*

* * * * *

██████████ *I'm taking your 11-9 [11,900]. That's the number you and Chairman ██████████ came up with. So I'm, I'm picking that number, saying, "We can do that."¹¹⁷² [emphasis added]*

876. In the view of the Tribunal majority, it is significant that Hana clearly (and correctly) understood in advance that the tipping point for FSC approval was precisely KRW 11,900, which was the share price reduction ultimately approved.

j. 25 November 2011

877. Hana Chairman ██████████ was again surreptitiously recorded by Lone Star as stating that he was told by the FSC that they "**need** the price reduction:"

CHAIRMAN ██████████ Well, if we decide the price, I'll give you assurance within one or two days.

[...]

I do have many dialogues with FSC. But I have a feeling, I told them 1 trillion won reduction. I told them, "He's kidding. No way." I talked to, you know, FSC people. One trillion reduction, no way.

[...]

[T]hey told me, I should, you know, recognize [...] [the] two [political] parties', you know, reaction on this deal.

[...]

That's why [with the] two parties, you know, all these Chairman of the FSS should step down.

MR. ██████████ And both of those parties want the price reduced today? So the FSC has basically told you that they need the, they need the price reduced as well?

¹¹⁷² Exhibit C-268, Lone Star ██████████ Meeting Transcript, pp. 3, 10.

CHAIRMAN [REDACTED] *That's right.*¹¹⁷³ [emphasis added]

k. A Note on the Surreptitious Recordings

878. Although the Claimants argue that such surreptitious recordings are not illegal in any relevant jurisdiction, the recording of business confidences certainly breached what the Korean participants considered ethical business behaviour. However, the surreptitious recordings are in evidence and the Tribunal is obliged to have regard to them.

l. Is there a "Smoking Gun?"

879. The Respondent argues that there is no documented order or instruction by the FSC in the Tribunal's record insisting on a price reduction as a condition of Hana approval.

880. In the view of the Tribunal majority, the explanation for the lack of a "smoking gun" resides in the oft-repeated acknowledgement of the FSC Chairman that the FSC had no jurisdiction over the private sale price negotiated by Hana and Lone Star and the FSC therefore insisted on orchestrating the price reduction from behind the scenes through Hana and the media. The FSC did not want to be exposed as pushing for a price reduction because it was improper and outside its mandate.¹¹⁷⁴

(4) The Conclusion of the Tribunal Majority on the Attribution of Fault

881. The Tribunal by majority concludes that the FSC strategy of delay and pressure to obtain a price reduction was an efficient and proximate cause, as was the criminal conduct of the Claimant LSF-KEB, of Lone Star's net loss of USD 433 million representing the partially reduced control premium received in its sale of KEB shares.

882. The Tribunal by majority recognises, as acknowledged by Mr. [REDACTED] during the surreptitiously recorded Honolulu Meeting, that "[i]f I were in a room with regulators and they said, we're gonna sign this now. We're gonna approve this right now if you do this, well that's a slightly different thing than implying it might make our job easier if you would

¹¹⁷³ Exhibit C-228, Transcript of November 2011 Meeting, pp. 6-7.

¹¹⁷⁴ See below paragraph 885; Exhibit CWE-023, [REDACTED] Second Witness Statement, paras. 22-23; Exhibit C-263, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011.

make some concessions.”¹¹⁷⁵ The Tribunal by majority is satisfied on the evidence that the communication from the FSC was not simply that a lower price “might make our job easier.” The clear communication from the FSC by words and conduct was that it would grant approval only when and if the share price was to be lowered sufficiently to provide political cover for the FSC in its dealings with the politicians, the unions and the vociferous critics of the level of profits that Hana had agreed to pay Lone Star.

883. The Tribunal majority is also satisfied, however, that Lone Star’s criminal conviction continued as a proximate and efficient cause of Lone Star’s loss up to and including the revised SPA of 3 December 2011 when, in the shadow of the Disposition Order, Lone Star realised that the only way it could obtain FSC approval was a reduced price of KRW 11,900 per share and accepted the new price to mitigate its loss.

884. The Tribunal by majority concludes that, when the testimony is considered in its entirety, and taken together with the correspondence and internal FSC documents, as well as the statements by FSC officials to the media, all of which being considered in light of the relentless political pressure being exerted on the FSC not to approve the sale to Hana at KRW 13,390 per share, it is more probable than not that the FSC wrongfully imposed a price reduction as a condition of approval despite there being no serious objection to Hana as a suitable controlling shareholder of the KEB.

885. The FSC itself acknowledged its intervention in share price negotiations would be improper when:

(a) the FSC Chairman acknowledged to the National Assembly on 7 October 2011,¹¹⁷⁶

¹¹⁷⁵ Exhibit C-479, Honolulu Meeting Transcript, p. 20.

¹¹⁷⁶ Exhibit C-696, Minutes of 7 October 2011 Meeting of National Policy Committee, p. 30:

Committee Member Won Il Yu: And if a voting right is deprived of, it is deemed that it would be difficult to sell the premium for the management right at an expensive price. Do you agree with it, Mr. Chairman?

Chairman of Financial Services Commission Seok Dong Kim: First because it was not yet decided in which manner a disposal order will be given with regard to the shares held by Lone Star, discussing the premium or a price thereof...

and in evidence in this proceeding,¹¹⁷⁷ that the acquisition share price was not within FSC's jurisdiction; and

- (b) the FSC declared to Hana its refusal to deal directly with Lone Star on the price issue because the FSC understood it should not be involving itself in matters of private contract, as this was wrong.¹¹⁷⁸

886. In the view of the Tribunal majority, the FSC's alleged "prudential interest" came to serve simply as a pretext to defer approval of the sale to Hana until a price reduction made approval palatable to the FSC's critics.

887. Having delayed for months a decision on the Hana application because, it said, of the potential conviction in the Stock Price Manipulation Case, the FSC proceeded to approve the Hana acquisition without regard to the conviction and without, it seems, taking any action in its "prudential" capacity. The FSC approval can only be attributed to the price reduction. When its condition of a price reduction was met, it approved the acquisition.

888. It is true that the FSC strategy of squeezing a lower share price was enabled by Lone Star's criminal conviction and the forced sale, but in the view of the Tribunal majority, Lone Star's contribution to its own financial loss does not relieve the FSC (for which the Respondent is responsible) from liability for its role in inflicting a USD 433 million loss on Lone Star.

Committee Member Won Il Yu: I am talking about the customary practice: the premium for the management right does not exist if there is no voting right, because the voting right will be limited.

Chairman of Financial Services Commission Seok Dong Kim: I do not think that it is appropriate to comment on this here, because that is an issue of price.

¹¹⁷⁷ S.D. Kim First Witness Statement, para. 10:

Second, the FSC respected the price-making function of the market. I believe that in order to enable the financial market to operate properly and advance, the government in principle should not directly influence prices decided in the market. There are times when the government unavoidably should interfere with the market, such as in the case of the 1997 Asian Financial Crisis and the 2008 Global Financial Crisis resulting from the Subprime Crisis. However, such interference has to be temporary and limited.

¹¹⁷⁸ Exhibit CWE-023, [REDACTED] Second Witness Statement, para. 22; Exhibit C-263, Email from [REDACTED] to [REDACTED] and [REDACTED] 28 October 2011.

XV. QUANTUM AND APPORTIONMENT

889. The Claimants rely on the guiding principle stated by the Permanent Court of International Justice in the *Chorzów Factory* case:

*The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*¹¹⁷⁹

890. The ILC Articles state in Articles 35 and 36 that such reparation is to consist of restitution, where possible, “to re-establish the situation which existed before the wrongful act was committed,” plus compensation for damages caused by the internationally wrongful act where restitution is not possible or provides incomplete relief, or in case restitution is not possible, a compensation which “shall cover any financially assessable damage.”¹¹⁸⁰
891. In accordance with the foregoing analysis, the Tribunal is satisfied based on the calculations of the Claimants’ expert, Professor ██████████¹¹⁸¹ that the loss attributable to the price reduction is USD 433 million, being the drop in value of the control premium from the 8 July 2011 SPA of approximately USD 4.1 billion at KRW 13,390 per share and the 3 December 2011 SPA of approximately USD 3.6 billion at KRW 11,900 per share (after adjustment for the mid-2011 dividend of USD 400.2 million).¹¹⁸²
892. The broader claims discussed in the Expert Reports of Professor ██████████ were predicated on assumptions he was instructed to make based on the Claimants’ legal theory of their case.¹¹⁸³ Thus, he starts his calculation with the HSBC transaction (which the Tribunal has

¹¹⁷⁹ Exhibit CA-010, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PJIJ, Judgment No. 13, 13 September 1928 (“*Chorzów Factory*”), p. 47.

¹¹⁸⁰ Exhibit CA-029 / RA-002, ILC Articles, Arts. 35-36.

¹¹⁸¹ Memorial, para. 670.

¹¹⁸² Exhibit CWE-034, ██████████ Second Expert Report, p. 15; see also ██████████ Second Expert Report, paras. 88-108, analysing Prof. ██████████ 25% premium and potential setoff for KEB’s increase in value.

¹¹⁸³ Professor ██████████ is the Robert C. Merton Professor of Financial Economics at the MIT Sloan School of Management and a Principal of The Brattle Group. Professor ██████████ calculates the quantum of Lone Star’s damages for (i) the blocked sale of KEB and (ii) the NTS’s “improper” tax assessments. The Tribunal has concluded that the Respondent committed no actionable wrong in terms of tax treatment under the 2011 BIT (including allegations grounded in the Korea-Belgium Tax Treaty). With respect to LSF-KEB, Professor ██████████ was instructed to start with

concluded is not actionable) and does not explicitly address the quantum loss associated with the share price reduction between the (unforced) 8 July 2011 Agreement with Hana and the 3 December 2011 (forced) agreement with Hana. The issue, therefore, is the proportionate contribution to the USD 433 million loss on 3 December 2011 when the new SPA was executed. At that time, the Parties had reduced the KEB share price to a level deemed by the FSC sufficient to satisfy public and political opinion (matters which had nothing to do with Hana's suitability).

893. There is no doubt, according to the majority of the Tribunal, that the FSC committed an actionable wrong by subordinating its statutory obligations to the advancement of its own institutional self-interest. Its paramount objective was to forestall the possible reprisals against the FSC and its officials for what its political critics would regard as an improvident approval. The reprisals potentially included a threatened audit of the FSC and, according to some members of the National Assembly, prosecution of some senior FSC officials.¹¹⁸⁴ At the same time, as discussed, the Claimants' criminal conviction and the consequent Disposition Order directly and materially contributed to the loss. Without LSF-KEB's conviction and the resulting Disposition Order, the FSC would not have been able to drive down the price of Hana's acquisition of KEB to the level which the FSC for its own reasons regarded as acceptable.

the Hong Kong Shanghai Bank Transaction and to assume that breach of the Respondent's obligations under the BIT prevented LSF-KEB from receiving the purchase price for KEB that was fully negotiated and agreed on an arm's-length basis with HSBC. He accepts that the HSBC SPA price of approximately USD 6 billion represented the fair market value of LSF-KEB's controlling stake in KEB at that time. Thus, he concludes that, assuming wrongful interference by the Respondent, LSF-KEB would have earned USD 6 billion in gross proceeds on the KEB sale to HSBC.

In the Tribunal's view, the HSBC transaction is not the correct starting point as the relevant HSBC facts all predate the 27 March 2011 entry into force of the 2011 BIT.

Nevertheless, Professor [REDACTED] proceeds to calculate the notional loss from 30 April 2008, which is the date the original HSBC lock-up period expired and brings forward his calculation to February 2012 when the sale of the KEB shares to Hana for approximately USD 3.5 billion closed. Professor [REDACTED] treats the sale to Hana as a "mitigating event" to the loss sustained on the HSBC transaction. Professor [REDACTED] then brings into account dividends received by LSF-KEB between the collapse of the sale to HSBC in 2008 and the sale to Hana in 2012, and adjusting for taxes and interest calculates the present value of LSF-KEB's lost profits on the unlawfully blocked sale to HSBC (*i.e.*, including interest and tax gross-ups) as of 30 September 2013, of approximately USD 2.9 billion.

¹¹⁸⁴ Exhibit C-243, "Seok-Dong Kim raises the white flag to 'Yang-ho [Byeon] Syndrome,'" *JoongAng Daily*, 14 May 2011.

894. The loss of USD 433 million is not capable of disaggregation into bits that can be assigned to one side or other. The loss must be dealt with as a lump sum, which must be allocated between the Parties at fault.
895. In the view of a majority of the Tribunal, it would be unreasonable to attribute a greater share of the fault to one party than to the other. The contribution of each was essential to the loss of the entire USD 433 million. It is appropriate in the circumstances that the loss be shared equally.
896. Accordingly, the Tribunal by majority awards Claimant LSF-KEB compensation in the amount of USD 216.5 million.

XVI. LONE STAR SEEKS COMPENSATION FOR ANY TAXES THAT MIGHT BE LEVIED ON THE AWARD

897. The Claimants submit that in the event the Tribunal awards damages to LSF-KEB, then LSF-KEB will be required to pay income taxes on that amount in both Korea and Belgium, at 22% and 33.99% respectively, amounting to a claim of USD 257.4 million. They ground their claim on the *Chorzów Factory* judgment, according to which “[t]he essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all of the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”¹¹⁸⁵ The Claimants state that the proceeds from the Award will be treated as **ordinary income** and will be subject to tax on that basis in both Korea and Belgium.¹¹⁸⁶
898. In support of this claim, the Claimants have obtained what they deem to be a “ruling” from the Belgian Tax Ruling Commission¹¹⁸⁷ stating that proceeds from the Award will be subject to the standard corporate tax rate (as adjusted) which totals 33.99%.¹¹⁸⁸ The

¹¹⁸⁵ Reply, para. 1583, citing **Exhibit CA-010**, *Chorzów Factory*, p. 47.

¹¹⁸⁶ Memorial, para. 693.

¹¹⁸⁷ Memorial, para. 694, referring to **Exhibit C-239**, Letter from Belgian Tax Ruling Commission to Allen & Overy LLP, 14 October 2013.

¹¹⁸⁸ Memorial, para. 694; **Exhibit CA-259**, Belgium Income Tax Code 1992, 10 April 1992, Art. 215 (setting base corporate tax rate at 33%) and Art. 463*bis* (increasing the corporate tax rate “[a]s an additional crisis contribution for the benefit of the State” by an additional 3 percentage points).

Claimants ask the Tribunal to assume that Korea will impose a withholding tax at the non-treaty rate of 22%.

899. The Claimants state that neither of these taxes would have been assessed on the capital gains and dividends that the Claimants earned (or would have earned) had the Respondent given timely approval to the sale of KEB and honoured its Tax Treaty obligations.¹¹⁸⁹ Thus, the Claimants argue that the tax gross-up is necessary because the Award will be subject to taxes at a rate greater than would have been imposed had the Respondent approved the Hana transaction in a timely way.¹¹⁹⁰
900. The Respondent argues that there is no persuasive authority for such a claim. The few arbitral panels that have considered the issue, it says, have uniformly rejected the idea.¹¹⁹¹ For example, in a recent NAFTA case, *Mobil v. Canada*, the tribunal explained that it was “not aware of a requirement under international law to gross up compensation as a result of tax considerations,” and that it therefore saw “little basis for incorporating the Claimants’ request for a 38% ‘gross up’ for tax reasons.”¹¹⁹² The tribunal in *Les Laboratoires Servier v. Poland* similarly rejected a claim of this nature, stating as follows:

Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness one way or another, of any proposed “gross-up” to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the “real value” of an investment must be addressed by the fiscal authorities in the investor’s home jurisdiction as well as the host state.¹¹⁹³

901. On the facts, the Respondent argues:

¹¹⁸⁹ Memorial, para. 695.

¹¹⁹⁰ Reply, para. 1581.

¹¹⁹¹ Counter-Memorial, para. 1119, referring to, *inter alia*, **Exhibit RA-092**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 1180-1181; **Exhibit RA-093**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (redacted), 22 May 2012 (“*Mobil v. Canada*”), para. 485; **Exhibit RA-094**, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progrès S.A.S. v. Republic of Poland*, UNICTRAL, Final Award (redacted), 14 February 2012 (“*Les Laboratoires Servier v. Poland*”), para. 666.

¹¹⁹² **Exhibit RA-093**, *Mobil Investments*, para. 485.

¹¹⁹³ **Exhibit RA-094**, *Les Laboratoires Servier v. Poland*, para. 666.

- (a) the Claimants' potential domestic tax obligations cannot reasonably be considered "losses" as that term is defined for purposes of damage recovery;¹¹⁹⁴
 - (b) the letter from the Belgian Tax Ruling Commission does not confirm that taxation in any particular amount would occur. Nor does it address other exemptions or factors that could impact a tax assessment to be conducted in the event of an award to Lone Star;¹¹⁹⁵ and
 - (c) the Claimants have submitted no evidence that they in fact would be taxed in Korea or Belgium (let alone taxed for the amounts they claim) nor have they submitted an independent tax opinion from a Korean or Belgian tax expert addressing these matters.¹¹⁹⁶ The Claimants' financial circumstances, income from other sources, possible write-offs, the tax year at issue, and the method by which the Claimants have kept their books, all could be factors that come into play, and with respect to which the Tribunal lacks information.¹¹⁹⁷
902. In their Reply, the Claimants state that their quantum expert, Professor ██████ (who does not claim to be a tax expert), took into account issues such as tax-loss carry-forwards and "[g]iven the data from Professor ██████ the ['ruling'] from the Belgian tax authority, and the Respondent's ability to declare how it intends to tax any award, there are no legal or factual impediments that prevent the Tribunal from considering the tax-gross up as a part of Lone Star's damages."¹¹⁹⁸

¹¹⁹⁴ Counter-Memorial, para. 1120, referring to, *inter alia*, **Exhibit RA-095**, *Acodim Sàrl v. Etablissements Rabaud*, French Cour de Cassation, Judgment, 13 November 1990, paras. 4-5 (confirming that an "injury allegedly suffered through the loss of a tax advantage [i]s an indirect loss" not directly attributable to the harm and therefore, not recoverable as damages); **Exhibit CA-314 / RA-096**, *Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004 ("*CSOB v. Slovakia*"), para. 397 ("Income taxes are an act of government (*'fait du prince'*) that are out of the parties' control and are unrelated to the obligation of one party to fully compensate the other party for the harm done. Moreover, they are consequential to the compensation and do not affect its determination. Compensation will not increase or decrease according to whether the amount of income tax rates is increased or decreased.").

¹¹⁹⁵ Counter-Memorial, para. 1121, n. 2634.

¹¹⁹⁶ Counter-Memorial, para. 1121.

¹¹⁹⁷ Counter-Memorial, para. 1122.

¹¹⁹⁸ Reply, para. 1586; **Exhibit CWE-034**, ██████ Second Expert Report, paras. 70-76. Professor ██████ stands ready to update the tax carry forward calculations at the time of payment, as with the appropriate interest calculations. See also para. 4, n. 1.

903. The Respondent's quantum expert, Mr. [REDACTED] found the Claimants' calculation too speculative to be relied upon.¹¹⁹⁹ In response to Professor [REDACTED] he states:

[W]e disagree that these tax gross-up amounts should be awarded as damages without a thorough examination of Claimants' tax situation and an expert opinion on Belgium taxes. Indeed, we did not find the opinion from the Belgium tax authorities to be helpful. Instead, we believe Claimants should have sought an independent tax opinion on the matter before approaching the Belgium tax authorities.

Given the size of the damages resulting from the tax gross-up on the KEB Sale Claims, this issue needs significantly more attention. [...]

Neither we nor Dr. [REDACTED] are tax experts. These tax matters deserve more attention than Claimants and Dr. [REDACTED] have given them.¹²⁰⁰

The Tribunal's Ruling on the Tax Gross-Up Claim

904. The Claimants have not established their claim for taxes that they say will be levied on this Award.
905. In the first place, as pointed out by the *CSOB v. Slovakia* tribunal, taxes "are consequential to the compensation and do not affect its determination."¹²⁰¹
906. Secondly, the evidence in support of this aspect of Lone Star's claim is unpersuasive. Lone Star has shown itself to be extremely sophisticated in its tax strategies and the Tribunal is not privy to arrangements that Lone Star has in place to minimise any tax that might become payable. Given the sophistication of Lone Star's tax planning, the Tribunal is unable to predict with confidence the amount required to "gross up" the Award, even if the Tribunal were inclined to do so. The Tribunal has not been made privy to the Claimants' actual tax situation. The lack of evidence from an independent tax expert on Lone Star's alleged tax exposure further weakens the claim.
907. Third, Professor [REDACTED] reports do not seem to have been coordinated with the Claimants' Belgian tax expert, Dr. [REDACTED] nor with its Korean tax expert, Professor [REDACTED]. It is not apparent where Professor [REDACTED] understanding of Belgian and Korean tax law

¹¹⁹⁹ [REDACTED] First Expert Report, para. 202.

¹²⁰⁰ [REDACTED] Second Expert Report, paras. 113-115.

¹²⁰¹ Exhibit RA-096, *CSOB v. Slovakia*, para. 367.

comes from.¹²⁰² Yet, it is Professor [REDACTED] on whose shoulders this aspect of the Claimants' claim principally rests. His speculation provides an insufficient basis for any "gross up" of compensation to account for potential taxes.

908. Fourth, the "ruling" from the Belgian Tax Ruling Commission dated 14 October 2013 is argumentative rather than informative. It is not for the Belgian tax authorities to argue the Claimants' case. For example, it says:

In the present case, the sale price had to be reduced because of the intervention of the Korean regulator, which, in addition, stripped LSF-KEB of its voting rights in respect of the shares in KEB.

However, this damage can hardly be equated with an expropriation or any other similar event, even though the regulators forced LSF-KEB into an almost impossible position where there was hardly any other choice than to agree a price reduction. LSF-KEB could possibly have sought another purchaser.¹²⁰³

There is no evidence of what was put before the Belgian authorities by Lone Star to outline its tax position and elicit such a response.

909. The claim for a tax gross-up of USD 257.4 million is of dubious legal validity but in any event fails on the lack of essential evidence. At the most basic level, the Claimants have not plausibly established the quantum of tax liability to which they might even potentially become liable.
910. The claim to a tax "gross-up" is therefore rejected.

XVII. CLAIM FOR PRE- AND POST-AWARD INTEREST

911. The Claimants claim interest dating from 3 December 2011 until the date of payment compounded annually at the average one-month U.S. Treasury rate.¹²⁰⁴

¹²⁰² For example, Exhibit CWE-034a, Appendices to [REDACTED] Second Expert Report, Appendix B, Workpaper Hana-7, line 9 cites Exhibit CA-259, Belgium Income Tax Code 1992, 10 April 1992, Arts. 215, 463*bis*. It is not clear how Professor [REDACTED] knew that these were the right sections of Belgium's Income Tax Code to apply.

¹²⁰³ Exhibit C-239, Decision of the Belgian Tax Ruling Commission, 20 August 2013, paras. 25-26.

¹²⁰⁴ Memorial, para. 691.

912. The Claimants submit that modern international tribunals consistently award compound interest. While the ICSID Convention is silent on the issue,¹²⁰⁵ compound interest has been awarded regularly.¹²⁰⁶
913. For the most part, the cases cited by the Claimants compound on an annual basis¹²⁰⁷ and generally do so based on the claimant's lost opportunity cost.¹²⁰⁸
914. The Claimants cite *Compañía del Desarrollo v. Costa Rica* for the proposition that:

*Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.*¹²⁰⁹

915. The tribunal in *Metalclad v. Mexico* held that interest "should run consequently from the date when the State's international responsibility became engaged."¹²¹⁰

¹²⁰⁵ Exhibit CA-077, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ("*Wena Hotels v. Egypt*"), para. 128 ("Moreover, the IPPA, the lease agreements, and the ICSID Convention and Rules are all silent on the subject of interest.").

¹²⁰⁶ Exhibit CA-091, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 ("*Middle East Cement v. Egypt*"); Exhibit CA-069, *Tecmed v. Mexico*; Exhibit CA-077, *Wena Hotels v. Egypt*; Exhibit CA-016, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 ("*Compañía del Desarrollo v. Costa Rica*"); Exhibit CA-039, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ("*Metalclad v. Mexico*"); Exhibit CA-042, *MTD v. Chile*.

¹²⁰⁷ See, e.g., Exhibit CA-091, *Middle East Cement v. Egypt*, para. 175 ("[T]his Tribunal concludes that in this case annually compounded interest and, in view of the rates in financial markets during the relevant period, a rate of 6% p.a. is appropriate"); Exhibit CA-069, *Tecmed v. Mexico*, para. 197 ("Therefore, the amount of US\$ 5,533,017.12 will accrue interest at an annual rate of 6%, compounded annually"); Exhibit CA-039, *Metalclad v. Mexico*, para. 128 ("So as to restore the Claimant to a reasonable approximation of the position in which it would have been in if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually."). However, see also Exhibit CA-077, *Wena Hotels v. Egypt*, para. 128 ("The Panel is of the view that in this case interest should be awarded and that it would be appropriate to adopt a rate of 9%, to be compounded quarterly.").

¹²⁰⁸ Exhibit CA-028, J. Gotanda, "Compound Interest in International Disputes," in Oxford University Comparative Law Forum (2004), Sec. VI.C.

¹²⁰⁹ Exhibit CA-016, *Compañía del Desarrollo v. Costa Rica*, para. 103.

¹²¹⁰ Exhibit CA-039, *Metalclad v. Mexico*, para. 128, quoting *Asian Agricultural Products v. Sri Lanka*, para. 114).

916. Professor [REDACTED] bases his calculations on the application of the “virtually risk-free one-month U.S. Treasury rate.”¹²¹¹ His calculations show the U.S. T-bill rate as being between 0.00% and 0.04%.¹²¹²
917. The Respondent pleads that the “Claimants are not entitled to the compound pre-award interest that they are requesting.”¹²¹³ The denial is not elaborated on. The Claimants seize upon this relative lack of response in their Reply:

*Respondent does not dispute Claimants' right to claim, or Professor [REDACTED] calculation of, compound interest.*¹²¹⁴

918. The Respondent's expert, Mr. [REDACTED] notes Professor [REDACTED] views on the calculation of interest but he does not take issue with the calculations themselves.

¹²¹¹ Memorial, para. 692; Exhibit CWE-014, [REDACTED] First Expert Report, paras. 42-43:

The interest rate in Figure 3, and also in my damage calculations for the HSBC and Hana Offer Cases, adjusts for the time value of money only. It does not include the extra rate of return that Lone Star might have earned by investing sale proceeds or dividends in a risky asset, say the U.S. or Korean stock market. It does not include the losses that Lone Star might have suffered during the financial crisis, say by investing in the banking sector at the start of the crisis.

My damage calculations are entirely in U.S. dollars. I use the one-month U.S. Treasury rate to account for the time value of money.

¹²¹² Exhibit CWE-014a, Appendices to [REDACTED] First Expert Report, Appendix E, Workpaper Tax Assessments-9.

¹²¹³ Counter-Memorial, para. 1070:

In this section, Korea demonstrates that (i) Claimants bear the burden of proof for any damages; (ii) Claimants have failed to prove that they are owed damages with regard to either their tax claims or their KEB sale claims; (iii) Claimants failed to mitigate their damages; (iv) Claimants improperly seek to add a “gross-up” to their claims for potential future taxation in the event of an award; and (v) Claimants are not entitled to the compound pre-award interest that they are requesting.

¹²¹⁴ Reply, para. 1588:

*Respondent does not dispute Claimants' right to claim, or Professor [REDACTED] calculations of, compound interest. However, Respondent and its expert refer repeatedly—and incorrectly—only to “pre-award” interest. In order to be made whole, Claimants must receive interest up to the date of **payment** of the award. Were the Tribunal to award interest only up to the date of the award, it would give Respondent an incentive to delay payment to Claimants. Accordingly, the Tribunal's award should order that interest will continue to run up to the date of payment of the award. [emphasis original]*

The Tribunal's Ruling on the Pre- and Post-Award Interests

919. The Claimant LSF-KEB has been deprived of the use of the Award money to date and the deprivation will continue until the date of payment. Correspondingly, the Respondent has had the benefit of the use of that money despite its role in the creation of the loss.
920. While the Respondent has made a general objection to the payment of interest, it has not made specific submissions on the rate, or the source of the rate (U.S. Treasury bills) or the annual period of compounding.
921. The Tribunal majority considers both the rate and the compounding period sought by the Claimants to be appropriate and in the absence of any objection by the Respondent accepts the U.S. Treasury bill benchmark as appropriate.
922. Accordingly, according to the Tribunal majority, the Claimant LSF-KEB is entitled to interest on USD 216.5 million from 3 December 2011 (the date LSF-KEB suffered the loss flowing from imposition of the share price reduction) until the date of payment compounded annually at the average one-month U.S. Treasury rate.

XVIII. CLAIMS FOR COSTS

923. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

924. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.
925. The Parties have made costs submissions but in view of the divided success, the Tribunal has decided that each side should bear its own costs.

926. The costs of the arbitration, including the fees and expenses of the Tribunal and the President of the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

| | |
|---------------------------------------|---------------------|
| Arbitrators' Fees and Expenses | |
| The Honourable Ian Binnie, C.C., Q.C. | 315,549.75 |
| The Honorable Charles N. Brower | 679,406.24 |
| Prof. Brigitte Stern | 651,989.78 |
| Mr. V.V. Veeder, QC | 488,288.31 |
| Assistant's Fees and Expenses | |
| Mr. David Campbell | 132,386.96 |
| ICSID's Administrative Fees | 370,000.00 |
| Direct Expenses (estimated) | 612,827.14 |
| Total | 3,250,448.18 |

927. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 1,625,224.09.

XIX. MAJORITY CLARIFICATION OF DIFFERENCES BETWEEN THE MAJORITY AND DISSENTING OPINIONS

928. In the following section the Tribunal majority wishes to address its differences with Professor Stern's Dissent. In doing so the majority in no way minimizes Lone Star's contribution to the loss for which, in the majority view, Lone Star bears equal responsibility. However, the focus of the Dissent is on exculpating the FSC and thus, inevitably, the focus of these comments is disproportionately on the FSC rather than on the misconduct of Lone Star.

929. As indicated at paragraphs 5 and 6 of the Dissent, there is no disagreement on the substantive rules for the establishment of State responsibility.¹²¹⁵

930. As indicated in paragraphs 10 to 13 of the Dissent, the rules governing the burden and standard of proof are also agreed.¹²¹⁶

¹²¹⁵ See above, Sections IX–XIV, which cover: Principles of Liability; Application of Principles of Liability to the Facts; Determination of Liability Relating to Alleged Breaches of the 2011 BIT by FSC Misconduct; Violation of the Treaty Obligations to Afford Fair and Equitable Treatment; and Causation and Apportionment of Liability.

¹²¹⁶ See above, Sections IX.B(1)–(2).

931. There is agreement with the observation in paragraph 17 of the Dissent that there are important differences in the litigation positions taken before this Tribunal and the ICC tribunal. However, whereas the Dissent emphasizes the change in position of Lone Star, the majority attaches equal importance to the change in position of Hana.¹²¹⁷ The Dissent quotes extensively from the ICC Award.

- (a) As to Lone Star, relief was claimed in the ICC Arbitration against Hana rather than the FSC because of Hana's assertions in the present proceeding that the price reduction was Hana's idea. Based on this position the ICC proceedings were commenced by Lone Star to recover compensation from Hana. The ICC tribunal found, contrary to the interpretation of the Dissent, that "**Hana's representatives correctly represented to Lone Star's representatives that a price reduction was necessary to secure the FSC's approval** of Hana's Application because this was the FSC's actual position at the relevant time"¹²¹⁸ [emphasis added]. In other words, Lone Star based its ICC claim on Hana's evidence but Hana's evidence, as interpreted by the ICC, incriminated the FSC, not Hana.
- (b) As to Hana, in the view of this Tribunal majority it is not surprising that Hana is willing to take responsibility for the price reduction and downplay the role of the FSC (Hana's past, current and future financial regulator) in a case where Hana itself faces no claim.
- (c) It would also be fair to take into account the conclusion of the ICC Tribunal that Hana's communications to Lone Star about the position of the FSC were likely based not on inferences or veiled suggestions but on Hana's "explicit discussions with the FSC about the price."¹²¹⁹

¹²¹⁷ See above, Section XIV.D(3)a) discussing Hana's ICC evidence about its understanding what the FSC had communicated to Hana as of 15 March 2011.

¹²¹⁸ Exhibit C-949, ICC Award, para. 252:

In conclusion, the Tribunal has found that the third narrative as described above accords with the truth: Hana's representatives correctly represented to Lone Star's representatives that a price reduction was necessary to secure the FSC's approval of Hana's Application because this was the FSC's actual position at the relevant time.

¹²¹⁹ Exhibit C-949, ICC Award, para. 189.

932. If, as the Dissent argues in paragraph 19, “good faith precludes clearly inconsistent statements,”¹²²⁰ then both Lone Star and Hana have offended, but for entirely explicable reasons, which in both cases involve litigation strategy not moral turpitude.¹²²¹
933. As noted in paragraph 24 of the Dissent, there is agreement that the acts of the FSC are attributable to Korea.
934. There is some force to the Dissent’s observation that the Tribunal majority focuses to a significant extent on “indirect evidence” (mainly documents) whereas the Dissent relies on the “direct” statements of the officials. However, as also pointed out at paragraph 14 of the Dissent, the Tribunal “will necessarily have to take a view on the credibility of the different witnesses” and for reasons set out in the Award, the majority does not accept as credible the denials of the FSC officials of misconduct. As explained in the majority Award, much of the evidence inculcating the FSC is indirect because the FSC strategy was to remain invisible to everyone but Hana.¹²²² The FSS Chair stated to the National Assembly in October 2011 that the share price in a contract between two private parties was not within its oversight.¹²²³ In any event, as stated in the FSC’s Disposition Order, the FSC’s mandate

¹²²⁰ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, para. 7.106 (available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9934.pdf>).

¹²²¹ See, e.g., paragraphs 863-864 above, providing transcript evidence of Mr. [REDACTED] and Mr. [REDACTED] from the ICC Arbitration.

¹²²² See above, Sections VIII.C(7)e)-(f), (w); **Exhibit C-479**, Honolulu Meeting Transcript; **Exhibit C-228**, Transcript of November 2011 Meeting (Mr. [REDACTED] and Chairman [REDACTED] describe indirect communications with the FSC in the surreptitious recordings).

¹²²³ See above, paragraph 615, citing **Exhibit C-696**, Minutes of the National Assembly Hearing of the National Policy Committee, 7 October 2011, pp. 23-25:

O Chairman of Financial Services Commission Seok Dong Kim:

...

And with regard to the sale contract of KEB shares signed between Hana Financial Group and Lone Star, the contract itself is basically something the concerned parties of the contract must make a decision, but in the case of Hana Financial Group as well, as pointed out by you, whether there is any problem of the breach of duty and in the soundness and stability of the bank must be looked into to a full extent.

O Committee Member Seung Duk Ko:

...

in the Hana approval application was to focus on the eligibility of Hana,¹²²⁴ not on the eligibility or ineligibility of LSF-KEB.

935. At paragraph 44, the Dissent sets out an extract of the ICC Award that discusses the evidence of Hana Chairman [REDACTED] which the Dissent says at paragraph 45 makes it “crystal clear that the testimonies [of the Hana Chair] in both [ICSID and ICC] proceedings convey exactly the same ideas.” However, the ICC tribunal drew a different “crystal clear” interpretation. In its view, and in the view of the majority in the present case, “Hana’s representatives correctly represented to Lone Star’s representatives that a price reduction was necessary to secure FSC’s approval”¹²²⁵
936. It is agreed, as stated in the Dissent at paragraph 53, that “representatives of the FSC have stated again and again that ... the price should be determined autonomously by the two parties to the agreement.” The Dissent simply takes these statements at face value whereas in the majority view, these representations demonstrate that the FSC well understood the limits of its legitimate role, and precisely because the interventions were understood by the FSC to be wrongful, the wrongful conduct had to be concealed, if possible, from Lone Star. The problem for the FSC’s “no fingerprints” strategy was that its position had to be

About these kinds of abnormal contract terms, I would like to ask that the Financial Supervisory Service to find out how such an abnormal contract could be agreed and submit a response to my question in writing. Mr. Chairman, would you do that?

O Chairman of Financial Supervisory Service Hyuk Se Kwon: But this is a contract relation between the parties...

O Committee Member Seung Duk Ko: Ask them. How such a ridiculous contract could be made possible in Korea.

O Chairman of Financial Supervisory Service Hyuk Se Kwon: Ok, I will try to grasp the circumstances.

¹²²⁴ See above, Section VIII.C(7)(u); Exhibit C-274, “Financial Services Commission Orders Lone Star Share Disposal Within Six Months,” FSC Press Release, 18 November 2011, p. 3:

The objective of the regulatory regime with respect to the review of major shareholder eligibility and the issuance of share disposition order is to exclude ineligible parties from becoming major shareholders. Thus, if an ineligible person is stopped from being a major shareholder of a bank, notwithstanding the lack of specific method for compliance, the objective can be met.

¹²²⁵ Exhibit C-949, ICC Award, para. 252.

conveyed directly or indirectly to Lone Star to persuade it to agree (under protest) to the lower price.¹²²⁶ In any event, the internal FSC documents include much incriminating evidence:

- (a) The Dissent relies on the FSC's 19 April 2011 memo. The memo has a list of options for the FSC's next steps. Significantly, for the majority, the list does not include the possibility of approval of the sale to Hana at the current price, even though the FSC had been told that the deal was to close on 24 May 2011.¹²²⁷ The Respondent did not lead evidence as to why the FSC did not list approval of the Hana transaction at its then price as an option even for discussion.
- (b) It appears that the FSC communicated to Hana the three options under consideration as early as 29 March 2011.¹²²⁸ During cross-examination, Mr. [REDACTED] testified that, "... I didn't hear it directly. I heard it through our legal counsel, law firm."¹²²⁹
- (c) An internal FSC document dated 6 November 2011 details Hana's options to avoid liability and the FSC "will no longer [have a] pretext/justification for delaying the approval" Mr. Sohn, an FSC Team Leader, testified that he had never seen this 6 November 2011 document before the arbitration. No reason was given as to why the FSC was considering Hana's possible strategies for avoiding liability or why Hana's potential breach of contract was being studied by the FSC¹²³⁰ if indeed it was operating at arm's length from Hana.

¹²²⁶ See, e.g., Section XIII(C)(6)(f).

¹²²⁷ See above, paragraphs 592-593, citing Exhibit C-572, FSC Examination of Lone Star Sale of KEB, pp. 7-9.

¹²²⁸ See above, Section VIII.C(7)e), citing [REDACTED] Second Witness Statement, para. 7; see also, Exhibit C-479, Honolulu Meeting Transcript, pp. 5-7.

¹²²⁹ TD7, 1827:17-22.

¹²³⁰ See above, Section VIII.C(7)n), citing Exhibit C-786 / R-515, FSC, Main issues on Lone Star. The Parties dispute the translation of this passage. While the Claimants submit that the correct translation is "pretext," the Respondent submits that the correct translation is "justify;" see also TD7, 1864:9-13.

- (d) On 18 November 2011, the FSC reviewed Hana's report of 14 November 2011¹²³¹ and decided that Hana needed to file a new application.¹²³² The press, quoting an FSC official, reported that in this ruling, "FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price.'"¹²³³
937. There is agreement with the Dissent's statement at paragraph 64 that the FSC had an important "prudential mission," but the problem (as discussed at paragraphs 521 to 523, 740 to 741 and Section XII of the Award) is that the FSC did nothing in relation to its "prudential" role at the time of LSF-KEB's conviction, nor when LSF-KEB abandoned its right to appeal, nor even after approving the Hana transaction, except to enable Lone Star to exit Korea once the price reduction had been agreed. If enabling Lone Star to exit Korea was a "prudential" measure it could have been accomplished three years earlier by timely approval of the HSBC transaction.
938. There is agreement with the observation at paragraph 65 of the Dissent that "[a] certain deference is due to acts of regulators." This is true when regulators act within their proper jurisdiction, but not where, as here (in the majority view) the regulator acts contrary to both domestic Korean law and in violation of the standard of fair and equitable treatment guaranteed in the BIT.
939. There is agreement with the Dissent at paragraph 69 that the FSC could have "refused the authorization and made an order that LSF-KEB must sell the shares it was not allowed by law to keep on the open market and appear as a hero in the fight against "'Cheat and Run.'" However, this overlooks the FSC's worry that such high handed behaviour to refuse approval of an obviously qualified transaction would hit Korea's global financial reputation

¹²³¹ **Exhibit R-119**, FSC, (Summary) Processing of Hana Financial Group, Inc.'s Application for Approval of acquisition of KEB as Subsidiary, p. 6.

¹²³² **Exhibit C-810**, Minutes of 18 November 2011 12th Non-Regular Meeting of FSC; **Exhibit C-927**, Transcript of 18 November 2011 12th Extraordinary Meeting of FSC, p. 23.

¹²³³ **Exhibit C-277**, "FSC opened a 'safe exit out' for Lone Star while sending a message to Hana Financial Group to 'lower the purchase price,'" *Hankook Ilbo*, 18 November 2011; **Exhibit C-278 / R-511**, "FSC, Pressure on Hana Financial and Lone Star to Reduce Price," *Yonhap Infomax*, 21 November 2011; **Exhibit C-811**, "Lone Star to lower KEB Price," *The Korea Times*, 21 November 2011 ("The FSC's ruling is widely interpreted as a call for both Hana and Lone Star to lower the aggregate sale price of about 4.41 trillion won.").

“and Korea’s creditworthiness abroad” and the FSC’s wish to minimize “growing international sentiment that Korea is very hostile to foreign capital.”¹²³⁴ As the Dissent acknowledges at paragraph 119, “the sale to Hana was in Korea’s global economic interest.”

940. It is agreed that the FSC did not impose “punitive” sale conditions in the Disposition Order. At paragraphs 69 to 74, the Dissent contends that the FSC “resisted all the pressures” to impose a punitive sale. The Dissent assumes that the FSC had jurisdiction to order a punitive sale, *i.e.*, a sale on the open market which would have denied Lone Star its entire control premium. The disagreement is with the assumption. In fact, the FSC Press Release announcing the Disposition Order of 18 November 2011 admitted that a “so called ‘punitive disposition’ is not appropriate since there is **no clear statutory basis for such a disposition** under the Bank Act”¹²³⁵ [emphasis added]. The Dissent claims for the FSC a punitive authority which the FSC did not claim for itself.
941. With respect to paragraphs 78 and 79 of the Dissent, it is agreed that prior to the March 2011 meeting of the FCS it was widely assumed that Hana would be approved as purchaser of LSF-KEB’s controlling interest. It is agreed that FSC approval did not proceed because the Supreme Court’s decision signalled that LSF-KEB would now face conviction of a serious financial crime. Conviction followed in October 2011. The Dissent suggests at paragraph 79 that in the Hana application the FSC was now going to have to “deal with an investor which was going to be convicted of a serious financial crime.” The majority

¹²³⁴ Exhibit C-764, FSC and FSS, Examination of Lone Star Sale of KEB, 15 April 2011, p. 8:

○ *It is necessary to prevent adverse effects of delay in the approval on the financial industries and Korea’s creditworthiness abroad.* [emphasis original]

* *Korea’s creditworthiness abroad may be adversely affected by continuing uncertainties of the financial industries due to a protracted delay in the KEB sale, growing international sentiment that Korea is very hostile to foreign capital, etc.* [emphasis added]

¹²³⁵ Exhibit C-274, “Financial Services Commission Orders Lone Star Share Disposal Within Six Months,” FSC Press Release, 18 November 2011, pp. 4–5:

Although the financial regulators may issue disposition order to Lone Star in case it does not voluntarily sell the stake, even in such case so-called “punitive disposition” is not appropriate since there is no clear statutory basis for such type of disposition under the Bank Act (See Exhibit 3).

See also Exhibit C-274, “Financial Services Commission Orders Lone Star Share Disposal Within Six Months,” FSC Press Release, 18 November 2011, pp. 14–15.

disagrees that the FSC had to deal with LSF-KEB's conviction in the Hana application. The FSC itself acknowledged that LSF-KEB's anticipated ineligibility was not relevant to the approval of Hana. The FSC Press Release announcing the Disposal Order stated that "the objective of the regulatory regime with respect to approval of major shareholder's **eligibility**" was "to **exclude ineligible** shareholders from **becoming** major shareholders" [emphasis added].¹²³⁶ LSF-KEB had no intention of "becoming" a shareholder and there is no evidence whatsoever that Hana ever lacked the requisites of eligibility.

942. It is agreed with respect to paragraphs 82 to 83 of the Dissent that the FSC questioned the May 2011 interim share purchase transaction on the basis that "paying a share price that was at least 50% higher than the market price could be a breach of its fiduciary duty to shareholders" but there is disagreement with the Dissent that "[t]he same type of consideration could justify an alleged pressure of the FSC" for the eventual price reduction on Lone Star's KEB shares. The two situations differ because had the interim purchase proceeded Hana would have paid a hefty premium for a 10% block of shares that did not carry control, whereas in the eventual sale the control premium was purchased by KEB.
943. There is agreement with the Dissent at paragraph 84 that a regulator may in appropriate circumstances "take some account of public or political opinion, unless in doing so it commits a violation of international law." However in the majority view, taking "some account of public or political opinion" is not an apt description of the FSC's departure from its statutory mandate, which was to approve (or not) Hana's eligibility, then interfering in a contract between private parties, which the FSC acknowledged to the National Assembly was not part of its job. Nor did its mandate permit it to inflict a financial loss on a foreign investor to "appease" its own domestic critics.

¹²³⁶ **Exhibit C-274**, "Financial Services Commission Orders Lone Star Share Disposal Within Six Months," *FSC Press Release*, 18 November 2011, p. 3:

The objective of the regulatory regime with respect to the review of major shareholder eligibility and the issuance of share disposition order is to exclude ineligible parties from becoming major shareholders. Thus, if an ineligible person is stopped from being a major shareholder of a bank, notwithstanding the lack of specific method for compliance, the objective can be met.

944. There is agreement with the Dissent at paragraph 87 that the drop in the market price of KEB stock between 2010 and 2011 significantly increased the control premium as a percentage of the market price, but disagreement that this provided the FSC with “rational economic reasons” to justify any FSC pressure for a price reduction. In the majority’s view, the economics of the transaction were irrelevant to the FSC’s approval function. It was not part of the FSC’s role to require the parties to rewrite the payment terms on which the parties had both agreed and which Hana said it was ready, willing and able to honour at the original price.
945. There is agreement that there were two relevant “interventions” by LSF-KEB, firstly the criminal stock manipulation for which it was convicted on 6 October 2011 and second, after “the alleged pressure” when LSF-KEB signed the 3 December 2011 share price agreement at the reduced share price. There is agreement with the Dissent at paragraph 107 that “but for” the conviction on 6 October 2011 the Hana transaction would probably have been approved.
- (a) However, there is disagreement with the expectation that the FSC would conduct itself properly prior to 16 March 2011 in any way exonerates, or is even relevant to, the misconduct of the FSC later that year. The observation in paragraph 112 of the Dissent that “[t]he analysis could stop here” would, if accepted, simply ignore the fact that the FSC’s postponement deferred its responsibility to later in the year, and it is the FSC’s later misconduct that constitutes the case the FSC is called on to meet.
- (b) With respect to Lone Star’s “second intervention” in signing the 3 December 2011 agreement at the reduced price, and with due respect to our colleague’s dissertation on « *acte de la victime intervenant à côté de l’acte de l’Etat* » the determination of whether or not « *la victime* » acts freely and independently so as to break the chain of causation is a question of fact, not doctrine. In the majority’s view Lone Star’s acceptance of the price reduction under protest cannot be taken as a free and independent act by « *la victime* » which broke the causal chain and exculpated the FSC because the choice before LSF-KEB was not whether to fight or give up but

whether to collect as much as it could from Hana before launching its claim against the Respondent in international arbitration. Acceptance of the KRW 11,900 per share purchase price mitigated LSF-KEB's loss and reduced the present claim against Korea. The reduction of USD 433 million in the purchase price agreed to by the parties in July 2011 (which Hana insisted it would willingly have paid) was not considered by « *la victime* » Lone Star as a "win-win commercial deal." Otherwise, Lone Star would not have commenced and pursued this arbitration over the past nine years.

XX. DISPOSITION

946. In closing, the Tribunal acknowledges with appreciation the quality of the extensive written and oral submissions of both Parties in respect to the many factual and legal questions that were raised in the course of these lengthy and complex arbitral proceedings.
947. For the reasons set forth above, the Tribunal therefore declares and orders as follows:
- (a) the Tribunal lacks jurisdiction under the 1976 BIT for all alleged acts or omissions of the Respondent;
 - (b) the Claimants' HSBC case and all its related damages claims are dismissed for lack of jurisdiction *ratione temporis* of the Tribunal;
 - (c) under the 2011 BIT, the Tribunal has jurisdiction over the alleged acts or omissions of the Respondent that occurred on or after 27 March 2011;
 - (d) the Tribunal has jurisdiction in respect of the allegations regarding the sale of KEB shares to Hana and related issues including the 2011 KEB dividends; and
 - (e) the allegations of misconduct by the Respondent unrelated to the Hana transaction are dismissed; and
 - (f) the Claimants' tax claims are dismissed.
948. For the reasons set forth above, the Tribunal majority hereby holds, declares, and orders that:

- (a) the Respondent breached the 2011 BIT in regards to LSF-KEB's sale of KEB shares to Hana in respect of the imposition of a price reduction of USD 433 million in violation of its treaty obligation to provide the Claimants with Fair and Equitable Treatment;
- (b) it is unnecessary for the Tribunal to dispose of the other breaches of the 2011 BIT alleged by the Claimants in relation to the sale of KEB to Hana because the violation of Fair and Equitable Treatment is a sufficient ground for a finding of liability and, on the evidence, a finding of liability on those other grounds would not affect the quantum of compensation;
- (c) LSF-KEB contributed to its loss equally with the Respondent in respect of the price reduction of USD 433 million in the sale of shares carrying majority control of KEB;
- (d) the loss is therefore apportioned equally between LSF-KEB and the Respondent;
- (e) the Respondent shall pay Claimant LSF-KEB Holdings SCA:
 - (i) the sum of USD 216.5 million;
 - (ii) plus interest, compounded annually at the average one-month U.S. Treasury rate, from 3 December 2011 to the date of payment;
- (f) as to the representation costs and expenses, in light of the divided success each side to bear its own costs; and
- (g) the costs of arbitration will be divided equally.

XXI. POSTSCRIPT FROM THE TRIBUNAL

949. The Tribunal would like to pay tribute to the late Johnny Veeder, former President in this case, and to the considerable work he performed during almost seven years, from the constitution of the Tribunal in May 2013 to his untimely passing in March 2020.

Charles N. Brower

The Honourable Charles N. Brower
Arbitrator

(Concurring Opinion attached)

Date: 23 August 2022

Professor Brigitte Stern
Arbitrator

(Subject to the attached
Dissenting Opinion)

Date:

The Honourable Ian Binnie CC, QC
President of the Tribunal

Date:

The Honourable Charles N. Brower
Arbitrator

(Concurring Opinion attached)

Date:

Brigitte Stern

Professor Brigitte Stern
Arbitrator

(Subject to the attached
Dissenting Opinion)

Date: 22 August 2022

The Honourable Ian Binnie CC, QC
President of the Tribunal

Date:

The Honourable Charles N. Brower
Arbitrator

(Concurring Opinion attached)

Date:

Professor Brigitte Stern
Arbitrator

(Subject to the attached
Dissenting Opinion)

Date:



The Honourable Ian Binnie CC, QC
President of the Tribunal

Date: 30 August 2022